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FCC Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERITAGE CABLEVISION
ASSOCIATES OF DALLAS,
L.P., and TEXAS
CABLE TV ASSOCIATION, INC.
Complainants,

v. File No. PA-89-002

TEXAS UTILITIES
ELECTRIC COMPANY,
Respondent.

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1991; Released: November 29, 1991

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a complaint brought under Section 224 of the Communications Act[1] by TCI Cablevision of Dallas, Inc. ("TCI") and its predecessors (collectively, "complainants") against Texas Utilities Electric Co. ("TU Electric"). Section 224 empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust and unreasonable pole attachment rates, terms and conditions. TCI alleges that TU Electric unjustly and unreasonably has imposed a separate charge for the attachment of facilities employed to provide nonvideo broadband communications services (*e.g.*, data transmission services), in addition to the regulated rate TU Electric has assessed TCI and its predecessors to attach equipment used to provide more conventional cable television services to subscribers.[2] Respondent TU Electric seeks dismissal of the complaint, asserting that the Commission lacks jurisdiction to resolve this dispute. For reasons discussed below, we conclude that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding. We further conclude that TU Electric's imposition of a separate charge for such pole attachments is unjust and unreasonable, and that a refund may be warranted.

II. BACKGROUND

2. Heritage Cablevision Associates of Dallas, L.P. ("Heritage"), the former cable television franchisee for the city of Dallas, filed the instant complaint against TU Electric on June 6, 1989. Heritage subsequently transferred its Dallas cable television franchise to TCI in late 1989, and amended the complaint on April 23, 1990, to add TCI as successor-in-interest in this proceeding.[3] TCI currently holds the Dallas franchise and owns and operates the cable television system serving that city.[4]

3. The complaint concerns TU Electric's practice of charging different pole attachment rates depending on the type of service provided by the cable operator over the equipment attached to TU Electric's poles. The complaint states that TU Electric has charged TCI and its predecessors a regulated rate to attach facilities employed strictly to provide conventional cable television services, and a separate, substantially higher rate to attach equipment used to provide nonvideo broadband communications services such as data transmission. TCI alleges that TU Electric's separate charge for these other pole attachments violates Section 224's prohibition against unjust and unreasonable rates, terms and conditions. TCI asks the Commission to terminate the separate charge for these pole attachments, substitute the regulated rate TU Electric assesses for "standard" cable television attachments, and order a refund of all amounts paid in excess of the regulated rate from June 6, 1989, plus interest.

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[1] 47 U.S.C. § 224.

[2] For purposes of clarity, the terms "conventional" or "traditional" cable services as used herein refer to the delivery of television broadcast signals, cablecast or access programming, or other video programming by cable television systems to subscribers. Excluded from this category are nonvideo and other services not associated with the provision or selection of conventional or traditional cable services, such as electronic mail delivery, facsimile transmissions and other data transmission services.

[3] Heritage also added Heritage Communications, Inc. ("HCI") to the complaint as predecessor-in-interest. HCI had obtained the Dallas cable television franchise in 1985, and shortly thereafter transferred the franchise to Heritage, its wholly-owned subsidiary. Heritage added TCI and HCI as complainants in response to TU Electric's claim that Heritage lacked standing to bring the complaint. *See* Section III. D., *infra*.

[4] Although Heritage and HCI remain complainants, we consider TCI to be the real-party-in-interest in this proceeding.

4. TU Electric answered on July 20, 1989, seeking dismissal of the complaint based primarily on the contention that the Commission lacks jurisdiction over the pole attachments at issue in this dispute. TU Electric asserts that Section 224 applies only to the attachment of facilities used to provide traditional cable television services, *i.e.*, video programming. To the extent facilities are used to provide nontraditional services such as data transmission, TU Electric argues that the rates charged for the associated pole attachments are not subject to Commission jurisdiction. After meeting informally with the parties and permitting an initial round of discovery, Commission staff determined that further briefing was necessary on the threshold jurisdictional issue.[5] The parties subsequently submitted extensive briefs and replies addressing whether Section 224 grants the Commission authority to resolve this dispute.

III. DISCUSSION

5. This complaint presents two main questions for our consideration: (1) does Section 224 empower the Commission to regulate the pole attachments at issue in this proceeding?; and (2) if so, is TU Electric's imposition of a separate charge for nontraditional service pole attachments unjust and unreasonable under Section 224? For reasons set out below, we answer both questions in the affirmative.

A. Factual Background

6. The essential facts are not in dispute. TCI leases space on utility poles owned by TU Electric in order to deploy cable television transmission facilities within TCI's Dallas franchise area. TCI provides traditional cable television services to subscribers over a system comprised primarily of coaxial cables. Each coaxial cable is lashed to an aerial support strand, which, in turn, is attached at a single point to the TU Electric pole. In addition to its coaxial cable facilities, TCI has deployed fiber optic cable in certain parts of its system. This fiber optic cable, like the coaxial cable, is overlashed to the aerial support strand without the need for additional guying or anchoring.

7. TCI's fiber facilities are utilized in part to provide traditional cable television services to subscribers. Fiber is used to import satellite video signals from satellite "dishes" in Mesquite to TCI's primary headend site in Dallas. From the primary headend, the video signal ordinarily is transmitted over the air via microwave to outlying hubs within the franchise area for ultimate distribution, over coaxial facilities, to individual subscribers. However, TCI represents that fiber also serves as a redundant video feed between the primary headend and certain hubs to ensure that those hubs will not fail if the microwave fails. This redundancy, TCI maintains, is required by the Dallas cable television franchise.

8. TCI also utilizes its fiber optic cables to provide nonvideo broadband communications services to nonresidential customers, including data transmission services pursuant to private contract to commercial customers in the Dallas metropolitan area. TCI's primary customer for such services is *The Dallas Morning News*. Fiber routes running roughly north and south through the northern half of the city connect the newspaper's downtown Dallas editorial offices and its printing plant in Plano, Texas.[6] TCI represents that these north-south fiber runs also route redundant video signals from the headend to certain hubs in addition to carrying information for *The Dallas Morning News*.[7] In addition, TCI uses fiber to connect communications between two long distance carriers, and between two University of Texas buildings.[8]

9. Pursuant to a pole lease agreement executed by predecessors of the parties,[9] TU Electric has charged complainants an annual rental of approximately $5.00 per pole to attach equipment employed to provide traditional cable television services during the relevant time period. This rate, which TU Electric concedes is subject to Commission regulation, is not in dispute in this proceeding. However, by virtue of a 1985 amendment to the original pole lease agreement, TU Electric also has imposed a separate annual rental of approximately $50-$100 per pole to attach equipment used to provide nonvideo broadband services, such as transmission of data for *The Dallas Morning News*. [10] This additional charge for nontraditional service pole attachments varies depending on the number of fiber strands in a particular sheath which are dedicated to data transmission rather than to the provision of conventional cable television services. The surcharge increases as the number of "data" fiber strands in the sheath in-

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[5] Letter from Howard M. Wilchins, Deputy Chief, Enforcement Division, Common Carrier Bureau to Michael W. Faber and Paul Glist (March 12, 1990) (outlining specific issues to be briefed).

[6] Plano is located to the north of Dallas, and the paper's printing plant lies outside the Dallas cable television franchise service area. TCI represents that it reaches the Plano printing plant by interconnecting its facilities to fiber optic cables owned by the Plano cable television franchisee. TCI states that it maintains the line extension into Plano under a management contract with the Plano franchisee.

[7] *See* para. 7, *supra*.

[8] As required by the Dallas franchise, TCI also provides channel capacity over its cable television system for institutional network services by governmental and educational users. For instance, the Mesquite school district uses TCI's coaxial facilities for sending slow speed data services from its administrative offices to the schools, and for video transmissions between schools and the administrative office. Likewise, the city government of Farmer's Branch (adjacent to Dallas) uses TCI's coaxial facilities as an institutional network to transmit data among the fire department, library, and police stations.

[9] The original pole lease agreement was executed in 1981 between Dallas Power and Light Company ("DP&L") and Warner Amex Cable Communications, Inc. ("Warner Amex"), the original cable television franchisee for the city of Dallas. DP&L subsequently was merged along with several other utilities into TU Electric. Warner Amex transferred its rights under the pole lease agreement and the Dallas franchise to HCI in 1985.

[10] The 1985 amendment arose when Warner Amex sought DP&L's permission to transfer its rights under the pole lease agreement to HCI. The agreement specifies that the licensor must approve in advance any assignment of contract rights by the licensee. DP&L's consent to the transfer was expressly conditioned upon HCI agreeing to execute the amendment establishing a separate rental for any use of the poles for other than traditional cable television services. TU Electric Initial Brief at 7.

creases.[11] For mixed-use fiber facilities transmitting both video signals and data, TU Electric apparently charges the annual rental for "standard" cable television pole attachments (approximately $5.00 per pole), plus the applicable surcharge for providing nonvideo services over the facilities (approximately $50-$100 per pole, depending on the number of "data" fiber strands).

B. The Jurisdictional Issue

10. TCI argues that Section 224 fully protects a cable operator's pole attachments regardless of the content transmitted over the cables attached to the poles. TU Electric maintains that the Commission lacks jurisdiction to regulate pole attachments supporting facilities employed to provide nontraditional cable television services. The parties put forth arguments based on: (1) the language of Section 224; (2) the origins and purposes of the Commission's pole attachment authority; and (3) certain provisions of the Cable Communications Policy Act of 1984 ("Cable Act").[12] We examine each of these arguments below.[13]

1. The Language of Section 224

11. In the absence of state regulation,[14] Section 224 directs the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable...."[15] "Pole attachment" is defined as "any attachment by a cable television system to a pole ... owned or controlled by a utility." [16] TCI emphasizes Congress's use of the phrase "any attachment." TCI contends that, since TCI is a cable system, "any attachment" by TCI to a TU Electric utility pole is subject to Commission regulation. TU Electric's basic premise is that to the extent facilities are employed to provide nontraditional cable television services such as data transmission, they properly are not considered part of a "cable television system." Therefore, TU Electric submits, the Commission may not regulate attachments for such facilities under Section 224. TU Electric notes that the term "cable television system," which Congress used to define the class of entities entitled to pole attachment rights, is not itself defined in Section 224. TU Electric submits that we must look elsewhere in the Communications Act (*i.e.*, Title VI) for guidance in discerning the true meaning of the term "cable television system" for purposes of Section 224.[17]

12. TU Electric has raised an issue of first impression. As indicated above, Section 224 applies to "any" pole attachment by a cable television system. We believe that, in light of the fact that Section 224 includes no language limiting the nature of the services of a cable operator to which it applies, Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system,[18] regardless of the type of service provided over the equipment attached to the poles. The fact that Section 224 does not define the term "cable television system" does not alter our conclusion, since TCI is indisputably a cable television system operator within its franchise area.[19] We recognize, however, that the language of Section 224 is not necessarily dispositive of the central issue presented in this complaint. We therefore examine the legislative history of Section 224 in an effort to discern the scope of the Commission's pole attachment authority.

2. Legislative History

13. Section 224 has its origins in the Communications Act Amendments of 1978,[20] whereby Congress, *inter alia*, granted the Commission jurisdiction over arrangements for the attachment of a cable television system to poles owned or controlled by utility companies.[21] As the Supreme Court has explained, Congress enacted this legisla-

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[11] The schedule for computing the extra charge is set forth in Exhibit D to the pole lease agreement.

[12] Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. §§ 521-559).

[13] On June 10, 1991, Metropolitan Fiber Systems, Inc. ("MFS"), a vendor of competitive access services, moved the Commission for leave to file an amicus brief in this proceeding generally supporting the position of TU Electric. In its brief, MFS argues that the Commission lacks jurisdiction over this matter based on the language of Section 224, its legislative history, and the provisions of the Cable Act. MFS also urges the Commission to avoid a ruling which might grant cable television operators preferential pole attachment rates under Section 224 for services which compete with the offerings of MFS and other competitive access vendors. While late-filed amicus briefs would not generally be appropriate in an adjudication such as a pole attachment complaint, in light of the broad policy issues at stake here, we are granting MFS's motion and accepting its amicus brief. Since TU Electric and MFS advance substantially similar objections, we will only address MFS's arguments to the extent they differ from those of TU Electric.

[14] Any state regulation of the rates, terms and conditions for pole attachments governs over federal regulation of pole attachments in that state under certain conditions. 47 U.S.C. § 224(c). Congress intended federal involvement in pole attachment regulation to be interstitial in nature; the Commission's mandate is to fill the regulatory vacuum created when individual states do not regulate pole attachments. *See* S. Rep. No. 580, 95th Cong., 1st Sess. 16-19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 109, 124-127; FCC v. Florida Power Corp., 480 U.S. 245, 247-48 (1987). Texas does not regulate pole attachments.

[15] 47 U.S.C. § 224(b)(1).

[16] 47 U.S.C. § 224(a)(4).

[17] *See* Section III.B.3., *infra*.

[18] TCI notes that its complaint relates only to areas within the scope of its cable television franchise. In this regard, the Commission's ruling that possession of a valid franchise is a prerequisite for pole attachment rights in a particular area has been upheld as reasonable. *See Paragon Cable Television, Inc. v. FCC*, 822 F.2d 152 (D.C. Cir. 1987).

[19] We note that, at the time of Congress's consideration and subsequent enactment of Section 224, the term "cable television system" was expressly defined in Section 76.5 of the Commission's rules, 47 C.F.R. § 76.5, as a "nonbroadcast facility. .. that distributes or is designed to distribute to subscribers the signals of one or more television broadcast signals...." In defining this term, the Commission set forth "the essential technological characteristics shared by all cable television facilities." *First Report and Order in Docket 20561*, 63 FCC 2d 956, 964 (1977). It did not intend a definitive or exhaustive statement of the types of services that could be offered over such a facility. Thus, for example, even though cable network and access programming were not expressly specified within this definition, these services, as well as those provided on cable channels specifically designated for governmental or educational use, were nevertheless considered to be services provided over or by a "cable television system."

[20] Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (codified as amended at 47 U.S.C. § 224).

[21] Monongahela Power Co. v. FCC, 655 F.2d 1254, 1255 (D.C. Cir. 1981) (per curiam).

tion "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."[22] By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television system operators in need of pole space.[23]

14. While the legislative history of Section 224 does not extensively address the question here or provide definitive guidance, it does confirm that Congress was concerned with abusive conduct by the utilities. For example, the relevant Senate report refers to testimony received in committee concerning: "the local monopoly in ownership or control of poles" by the utilities; the "superior bargaining position" enjoyed by utilities over cable operators in negotiating rates, terms and conditions for pole attachments; and allegations of "exorbitant rental fees and other unfair terms" demanded by the utilities in return for the right to lease pole space.[24] As the Senate report and the case law bear out, Congress clearly acted to protect cable operators from anticompetitive conduct by utilities.

15. Within this broad framework, which is undisputed, the parties perceive different congressional intentions regarding the scope of the protection accorded cable operators under Section 224. TCI submits that Congress intended Section 224 to arrest utility efforts to prevent broadband competition from cable television operators and to protect cable television operators from such efforts.[25] In contrast, TU Electric maintains that Congress enacted Section 224 only to facilitate the development of traditional cable television services to the public, and thus intended Section 224 to apply only to pole attachments for traditional cable television services, *i.e.*, video programming. In support of this proposition, TU Electric observes: that one of the specific purposes of the legislation as described in the Senate report was to "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public;" that Congress authorized the Commission to create an administrative forum for the resolution of CATV pole attachment disputes; and that the expansion of the Commission's regulatory authority in this area was "strictly circumscribed."[26] TU Electric also notes that Section 224(c)(2) directs any state attempting to preempt federal pole attachment regulation to certify to the Commission that it considers, *inter alia*, "the interests of the subscribers of cable television services...."

16. We agree that a principal goal of Congress in enacting Section 224 was to facilitate the development of traditional cable television services to the public. However, we reject the notion that Congress intended Section 224 to reach only those pole attachments supporting equipment employed *exclusively* to distribute television broadcast signals and other video programming. TU Electric, in effect, urges us to find that Congress intended the Commission to address utility misconduct only to the extent that such abuse affects the provision of traditional cable television services to the public, thus leaving utilities free to exercise their monopoly ownership of poles to frustrate attempts by cable operators to expand their service offerings beyond video entertainment in competition with the utilities' own nonvideo communications services. Nothing in the legislative history supports a conclusion that protecting traditional cable television services was Congress's *exclusive* concern, however. While there is no extensive or definitive discussion of this issue in the legislative history, the Senate report specifically referenced testimony "that the introduction of *broadband cable services* may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future."[27]

17. Moreover, the term "broadband cable services" to which Congress was referring has commonly been understood throughout the years to include nonvideo services, *e.g.*, business data transmission, as well as video services. In 1972, among the many types of services the Commission described as possible by cable's multichannel or broadband capacity were:

> [F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications....[28]

Indeed, its recognition that cable could provide "these broader functions" led the Commission to substitute use of the "more inclusive term cable television systems" for "CATV" (Community Antenna Television). Similarly, in

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[22] *Florida Power, supra*, 480 U.S. at 247.

[23] *See* Alabama Power Co. v. FCC, 773 F.2d 362, 364 (D.C. Cir. 1985); Texas Power and Light Co. v. FCC, 784 F.2d 1265, 1267 (5th Cir. 1986); *Florida Power*, 480 U.S. at 247-48.

[24] S. Rep. No. 580, 95th Cong., 1st Sess. at 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 121.

[25] TCI cites testimony received during the committee hearings leading up to enactment of Section 224 in claiming that this legislation emerged from federal policy to encourage and protect cable television delivery of broadband communications services such as data transmission.

[26] TU Electric Initial Brief at 14-15, quoting S. Rep. No. 580, 95th Cong., 1st Sess. at 14, 15, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 122, 123.

[27] S. Rep. No. 580, 95th Cong., 1st Sess. at 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 121 (emphasis added). The same anticompetitive concerns which the Senate report referenced with respect to telephone companies are applicable with equal force to electric utilities, which may seek to provide broadband communications services in competition with cable operators and other providers of such services. In this regard, TCI asserts that TU Electric has demonstrated a competitive interest in the fiber data business, noting that in 1989 TU Electric proposed to build a fiber optic system on its poles in order to provide communications services for a private customer. Supplemental Brief of Cable Complainants at 44 and n. 91 (citing Dallas Business Journal, April 10, 1989, p. 1).

[28] *Cable Television Report and Order*, 36 FCC 2d 143, 144 n. 10 (1972), quoting *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, 419-20 (1968). In *Section 214 Certificates (Final Report and Order)*, 21 FCC 2d 307 (1970), the Commission explicitly adopted restrictions on telephone common carriers' ownership and operation of "CATV" facilities in order to ensure that cable television development into a broadband communications system would not be inhibited by telephone companies. In so doing, the Commission stated that "CATV service represents the initial practical application of *broadband* cable technology" and that "there is a substantial

TV Signal Company of Aberdeen v. AT&T,[29] which involved an antitrust action against telephone utilities for an alleged conspiracy to retrain trade in refusing a cable company's request to attach cables to telephone poles, the court construed the term "broadband" as applying to "a wide range of communications services including meter reading, stock market quotations, burglar and fire alarm services, at-home shopping services, data service, and two-way television."[30]

18. Given the commonly understood meaning ascribed to the term "broadband cable services, " both prior to and contemporaneous with the passage of Section 224, we believe that Congress was aware of the Commission's longstanding view of cable as a provider of video *and* nonvideo services. Consistent with that view, Congress was aware that cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements to frustrate these potential competitors in the provision of nonvideo services. We believe that the legislative history, especially when considered in light of the totality of the circumstances prevailing prior to and at the time of Section 224's enactment, does not indicate any congressional intent to draw a distinction or create a dichotomy between traditional and nonvideo broadband services offered over cable systems for purposes of that section. Indeed, we are unable to find any probative evidence in the Senate report or elsewhere in the legislative history of Section 224 that Congress intended strictly to limit our pole attachment authority in the manner suggested by TU Electric. We conclude that, on balance, the legislative history supports the view that the pole attachments at issue in this proceeding come within the meaning of Section 224.[31]

3. The Cable Act

19. We next consider the relevance and impact of the Cable Act, enacted six years after Congress authorized the Commission to regulate pole attachments. TU Electric submits that the Cable Act limits the reach of the Commission's Section 224 authority. TCI contends that the Cable Act does not alter the scope of Section 224's protections, but rather preserves existing federal policy permitting, encouraging and protecting cable's delivery of broadband services.

20. As noted above, the term "cable television system," which defines the class of entities entitled to pole attachment rights under Section 224, is not defined in that section. TU Electric maintains, however, that the meaning of "cable television system" is apparent from definitions set forth in the Cable Act (Title VI of the Communications Act). The Cable Act defines "cable system" as "a facility... designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community...."[32] "Cable service," in turn, is defined in the Cable Act as:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.[33]

21. TU Electric argues that these definitions, properly read in conjunction with Section 224, restrict the Commission's pole attachment authority. TU Electric's basic "premise is that Section 224 does not protect service offerings by cable operators which are not considered "cable service" within the meaning of the Cable Act. TU Electric observes that the transmission of data does not fall within the Cable Act's narrow definition of "cable service" which essentially encompasses only the provision of video entertainment.[34] Since data transmission is not "cable service," TU Electric argues that facilities employed to transmit data properly cannot be considered a "cable system" as defined by the Cable Act. Finally, TU Electric submits that attachments for such facilities do not come within the meaning of "pole attachment" as set forth in Section 224(a)(4), since the attachments do not support a "cable television system." Therefore, TU Elec-

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expectation that *broadband* cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds." *Id.,* 21 FCC 2d at 324-25 (emphasis added). Similarly, in *Clarification of the Cable Television Rules,* 46 FCC 2d 175, 176 (1974) (emphasis added), the Commission, in expressing concern for the orderly development of cable within the structure of the existing nationwide communications system, noted that cable television "presumably will become a major and integrally vital element of what many see as the *broadband* communications system of the future."

[29] 617 F.2d 1302, 1304 n. 1 (8th Cir. 1980).

[30] *See also Wisconsin Bell, Inc.,* 56 RR 2d 1262 (Com. Car. Bur. 1984), *review denied,* FCC 85-348 (released July 11, 1985), *aff'd sub nom. Paragon Cable Television, Inc. v. FCC,* 822 F.2d 152 (D.C. Cir. 1987).

[31] Our conclusion is consistent with the discussion in the Senate report concerning the "communications nexus" necessary to vest pole attachment jurisdiction in the Commission: "Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission." S. Rep. No. 580, 95th Cong., 1st Sess. at 15, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 123. Nothing in this language suggests that our jurisdiction depends on the nature of the services provided by the cable system operator over its facilities attached to the utility's poles (*i.e.,* traditional video programming services or other broadband communications services). Rather, our jurisdiction simply is predicated on whether, as in this case, the utility has designated space on its poles for "wire communications" and has granted a cable system operator access to that space. In our judgment, this language does not support TU Electric's contention that our jurisdiction extends only to those pole attachments which support equipment employed exclusively to provide video entertainment or other programming services.

[32] 47 U.S.C. § 522(6).

[33] 47 U.S.C. § 522(5).

[34] TU Electric contends that the data transmission services offered by TCI may fall into one of four categories: (1) intrastate common carrier services; (2) interstate common carrier services; (3) intrastate private contract services; or (4) interstate private contract services. TU Electric maintains that regardless of classification, the services are not "cable television services."

tric concludes that the pole attachments at issue in this proceeding are not subject to the Commission's pole attachment jurisdiction.

22. TU Electric's argument is without merit. The Cable Act in no way limits our pole attachment authority under Section 224. As TCI observes, 47 U.S.C. § 552 specifies that the definitions set forth in the Cable Act apply only "for purposes of this title [Title VI]." Nothing in the language or legislative history of the Cable Act suggests its definitions were intended to limit the Commission's pole attachment jurisdiction. Indeed, since Congress did amend another provision of Section 224 (concerning minimum certification requirements for state regulation of pole attachments) when enacting the Cable Act, it is apparent that, in other respects, Congress did not intend to affect Section 224. Therefore, contrary to TU Electric's contention, we conclude that the Title VI definitions are irrelevant to the issues before us.

23. In any event, even when Section 224 is read in conjunction with the Cable Act, it is clear that TCI's facilities properly are not excluded from the protections of Section 224 as TU Electric maintains. First, with respect to the Cable Act itself, we note that it provides: "Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier basis or private contract basis."[35] This provision appears to reflect a congressional understanding that a cable system may offer services other than traditional cable services without ceasing to be a cable system.

24. Moreover, the House report accompanying the Cable Act clearly defeats TU Electric's claim that a cable operator's facilities cease being a "cable system" merely because they carry non-cable communications services in addition to video entertainment:

> The term "cable system" is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.[36]

TCI's facilities are "designed to include the provision of cable services (including video programming) along with communications services other than cable service."[37] Therefore, its facilities are a "cable system" within the meaning of the Cable Act, even though TCI also provides data transmission services over its system.[38] Thus, even if the Cable Act's definitions apply to this proceeding, TCI, as the operator of a "cable system," properly may invoke the protections of Section 224 with respect to alleged unjust and unreasonable pole attachment rates, terms and conditions.[39]

4. Other Issues Raised by the Parties

25. *Policy Considerations.* TU Electric urges us to disclaim jurisdiction in this proceeding based on policy considerations, noting that TCI's competitors in the data transmission market in Dallas are not entitled to regulated pole attachment rates pursuant to Section 224. The utility expresses concern that if the Commission grants the relief requested in this complaint, TCI and all cable operators would enjoy a competitive advantage over non-cable television providers of data transmission services. TU Electric notes that it has leased pole space in the Dallas area to Western Union at rates comparable to the separate charge TU Electric has assessed TCI for so-called "non-cable television pole attachments." TU Electric apparently fears that Western Union and other providers of data transmission services in the Dallas area will be unable effectively to compete with TCI should the Commission assert jurisdiction over TCI's disputed pole attachments.

26. We are mindful of the competitive concerns raised by TU Electric (and MFS, *see* n. 13, *supra).* However, we cannot refrain from fulfilling our statutory mandate to ensure just and reasonable pole attachment rates, terms and conditions for cable television system operators, simply because our authority may not extend to every competitor in the data transmission market. We recognize that the result we reach today will afford cable television system operators an advantage over other competitors who are not entitled to regulated pole attachment rates under Section 224. However, on balance, we conclude that this

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[35] 47 U.S.C. § 541(d)(2).

[36] H.R. Rep. No. 934, 98th Cong., 2d Sess. 44, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4655, 4681. In addition the House report states: "The Committee intends th[e] definition of cable services to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under Section 621(c) [47 U.S.C. § 541(c)] and all other communications services that could be provided over a cable system. The Committee also intends that nothing in Title VI shall be construed to affect existing regulatory authority with respect to non-cable communications services provided over a cable system." *Id.* at 41, *reprinted in* U.S. Code Cong. & Ad. News at 4678.

[37] *Id.* at 44, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 4681.

[38] In addition to permitting and encouraging cable operators to provide "communications services other than cable service" (such as data transmission), the Cable Act explicitly recognizes that franchising authorities may require cable franchisees to designate channel capacity for "public, educational, or governmental use." 47 U.S.C. § 531. Such use may include nonvideo communications services, *e.g.,* institutional network services. *See* H. R. Rep. No. 934, 98th Cong., 2d Sess. at 27, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 4664. As noted above, *see* n. 8, TCI provides channel capacity for educational and governmental use, including nonvideo data transmission services, as required by its franchise consistent with the Cable Act. While these services, like data transmission services for commercial purposes, do not come within the definition of "cable service" contained in the Cable Act, TCI's facilities do not cease being a cable system under the Cable Act by virtue of providing channel capacity for governmental and educational use as envisioned by Congress.

[39] We reject TU Electric's argument that TCI operates both a cable television system and a separate data network. In our view, the record indicates that data and video are commingled over TCI's transmission facilities, rather than offered over distinct networks. *See, e.g.,* Complaint at 3-4; Supplemental Brief of Cable Complainants at 3-10; Supplemental Reply Brief of Cable Complainants at 8-10.

result, which we believe is the most reasonable interpretation of Section 224, is more pro-competitive than the current situation where utilities such as TU Electric can forestall competition by cable operators in the data market by charging pole attachment rates which bear no relation to costs. Our action today enhances cable operators' ability to compete against utility companies in the provision of data services. While the Commission favors opening markets up to competition as fully as possible, Congress, in enacting Section 224, expressly limited its applicability to cable television systems.[40]

27. *Pole Attachments Outside of the Dallas Franchise Service Area.* TU Electric urges us to find that Section 224 affords a cable operator no protection outside of its franchised service area. As noted above, TCI provides data transmission services to *The Dallas Morning News* over fiber runs which extend beyond the Dallas franchise service area into Plano. Although TCI maintains the line extension into Plano, the cable franchisee in that locality owns the lines and presumably contracts with a local utility to lease pole space to attach its equipment. The annual rental for pole space in Plano is a matter between the Plano cable operator and the utility which owns the poles, subject, of course, to the requirements of Section 224. From the record before us, TCI and TU Electric appear to have no contractual relationship regarding these attachments, and complainants' request for refund of overpayments does not include these attachments. In any event, as noted above, *see* note 18, the Commission has already held that pole attachments outside a franchise area are not covered by Section 224.

28. In summary, we have examined the language of Section 224, as well as the origins and purpose of the statute as revealed by the legislative history and relevant case law. We have also considered the relevance and impact of the Cable Act on the meaning of the term "cable television system" as it is used in Section 224. In addition, we have addressed other issues raised by the parties pertaining to the jurisdictional question. All of these factors support the view that TCI's disputed pole attachments are protected by Section 224. We conclude that Section 224 empowers us to regulate the pole attachments at issue in this proceeding.

C. TU Electric's Practice of Imposing a Separate Charge For Cable System Pole Attachments For Nontraditional Services

29. We next address TCI's allegation that TU Electric's imposition of a separate charge for pole attachments for nontraditional services is unjust and unreasonable under Section 224. Our procedural rules require the respondent to justify "the rate, term or condition alleged in the complaint not to be just and reasonable."[41] Despite this clear directive, TU Electric fails to provide any such justification. The utility offers no cost justification for the disputed surcharge, nor does TU Electric suggest that it incurs any additional costs in preparing or maintaining its poles as a result of TCI's installation of fiber optic cables or TCI's data transmission activities. TU Electric does not even dispute TCI's statement that the physical attachment of fiber to the poles is identical to that of coaxial cable.

30. Instead, TU Electric states only that the 1985 amendment to the pole lease agreement providing for the separate charge was arrived at through "arms length negotiations" between predecessors of the parties. The record does not support this claim. TU Electric's predecessor, DP&L, refused to approve the 1985 contract assignment from Warner Amex to HCI until HCI agreed to amend the pole lease agreement to provide for the separate charge that is the subject of this complaint.[42] Given the utility's *de facto* veto power over the licensee's proposed assignment, TCI's predecessor (HCI) appears to have had little choice but to accede to DP&L's demands to amend the agreement. In these circumstances, the amendment cannot properly be described as the result of "arms length negotiations" where both parties freely bargain over contract terms. Rather, the amendment appears to be the result of the superior bargaining position utilities typically enjoy over cable operators in negotiating the rates, terms and conditions for pole attachments.[43] In our judgment, Congress authorized the Commission to regulate pole attachments in order to curb just this sort of abuse of superior bargaining power by utilities.

31. Section 224 makes no provision for disparate rates based on the type of service provided over the equipment attached to a utility's poles. Section 224 permits a single, regulated, just and reasonable rate for pole attachments. Under the statute, a rate is just and reasonable if it:

> assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying

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[40] MFS argues that certain wording changes made during the course of Section 224's passage through Congress limit its applicability to traditional cable services. As MFS notes, in enacting Section 224, Congress considered but rejected language that would have extended protection to all pole attachments for "wire communication," which is defined broadly under Section 3(a) of the Communications Act, 47 U.S.C. § 153(a). This wording change appears to have resulted from testimony or written submissions before Congress on the proposed legislation by several witnesses expressing concern that use of the term "wire communication" might involve the agency in rate regulation for many entities other than cable television system operators which traditionally utilize space on utility poles, and recommending substituting the term "cable television system" in lieu of "wire communication." *See* Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 95th Cong., 1st Sess. at 18 (FCC Chairman), 173 (Edison Electric Institute), 216 (Continental Telephone Corp.) (1977). Congress subsequently adopted Section 224 using the term "cable television system." Although the Senate report does not address this issue, we view this change in language as evidence that Congress intended to limit the scope of the class of *entities* entitled to pole attachment protection under the statute to operators of a cable television system. Contrary to MFS's contention, however, there is nothing to suggest that Congress intended by this language substitution to limit the scope of *services* provided by cable operators entitled to the protections of Section 224 to the provision of traditional video entertainment services.

[41] 47 C.F.R. § 1.1407(a) (1990).

[42] *See* n. 10, *supra*.

[43] *See* S. Rep. No. 580, 95th Cong., 1st Sess. at 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 121.

> the percentage of the total usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole ...[44]

As one court has explained, our task under the statute is "to ensure that the pole attachment rates charged cable operators do not fall below the statutory minimum -- incremental costs -- or above the statutory maximum -- fully allocated costs."[45]

32. We hold today that TU Electric may charge TCI a single, regulated rate for pole attachments within TCI's franchise area, and that this rate must fall within the parameters established by Section 224(d)(1). TU Electric lawfully may not charge TCI different pole attachment rates depending on the type of service being provided over the equipment attached to its poles, and we find that TU Electric's imposition of a separate charge for so-called "non-cable television pole attachments" is unjust and unreasonable under Section 224.

33. We therefore will require TU Electric to refund any amounts paid by complainants in excess of the annual rental for "standard" cable television pole attachments as set forth in the pole lease agreement (approximately $5.00 per pole).[46] Any such refund, however, shall include only those excess charges actually paid by complainants to TU Electric after June 6, 1989, plus interest.[47] We note that no refund may be warranted; TU Electric maintains that complainants have not paid the separate charge for so-called "non-cable television pole attachments" since sometime in 1987.[48] We direct the parties to advise the Commission within sixty days of release of this order whether a refund is required, and, if so, to provide sufficient information to enable us to calculate the exact amount of the overcharges to be refunded.

D. Procedural Issues

34. *Request For Declaratory Ruling.* In its June 6, 1989, pleading, Heritage, joined by the Texas Cable TV Association, Inc., also requested the Commission to issue a declaratory ruling stating that: (1) any effort to limit the content of a cable operator's transmissions is an unjust and unreasonable pole attachment term and condition, and unenforceable under Section 224; (2) any effort to discriminate between coaxial and fiber attachments is an unjust and unreasonable pole attachment rate, term and condition, and unenforceable under Section 224; and (3) the maximum lawful rate for fiber attachments by a cable operator is fully subject to Section 224. Such broad declaratory relief is inappropriate and unnecessary in these circumstances. The Section 224 adjudicatory process is the proper forum to resolve this dispute, and Section 224 provides us ample tools to address the issues raised in this specific factual context. Accordingly, we shall deny the request.

35. *TU Electric's Motion to Dismiss.* TU Electric moved the Commission on July 20, 1989, to dismiss the complaint and request for declaratory ruling based on the following alleged procedural infirmities: (1) the pleading does not clearly indicate the role of the Texas Cable TV Association in this proceeding; (2) the pleading improperly combines a complaint pursuant to Section 224 and a request for declaratory ruling; (3) the refund request is time-barred by the two-year limitations period established in Section 415 of the Communications Act[49] for certain actions against carriers; and (4) the pleading lacks certain documentation required by the Commission's rules, such as a copy of the Dallas cable television franchise and certain "rate" information. Additionally, TU Electric seeks dismissal on the grounds that the pleading fails to demonstrate the need for the requested declaratory ruling.

36. TU Electric's procedural objections are unavailing. Since we are denying the request for declaratory relief by complainants, TU Electric's protests concerning that request are moot. TU Electric's remaining arguments are without merit. First, the pleadings clearly indicate that the Texas Cable TV Association's participation in this proceeding relates strictly to the request for declaratory ruling. Second, without deciding whether the two-year limitations period in Section 415(b) applies to pole attachment complaints under Section 224, we simply note that Section 415(b) does not limit our ability to redress harm caused by longstanding misconduct such as this on a prospective basis.[50] Moreover, TCI seeks refund only of those overpayments made to TU Electric after June 6, 1989, the date the complaint was filed.[51] Thus, even if Section 415 were applicable here to pole attachment matters, it would not bar TCI's claim for refund in this proceeding. Finally, to the extent that the original complaint omitted certain documentation arguably required by our rules, complainants subsequently have submitted all information necessary to resolve this dispute with no prejudice to the respondent. We therefore deny TU Electric's motion to dismiss to the extent it relates to matters other than the request for declaratory ruling.

37. *Additional Evidentiary Procedures.* TU Electric also requests that, should we deny its motion to dismiss and/or assert jurisdiction, we order discovery, conduct hearings and establish such other evidentiary procedures as we may deem appropriate to clarify the issues presented in this proceeding. We find no need for such additional evidentiary procedures. The pleadings and briefs filed by

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[44] 47 U.S.C. § 224(d)(1).

[45] *Alabama Power, supra,* 773 F. 2d at 364.

[46] Neither party disputes the justness and reasonableness of the rate for "standard" pole attachments contained in the pole lease agreement. Should this rate fall below the statutory minimum prescribed by the statute, TU Electric may, of course, seek relief from the Commission pursuant to Section 224. Likewise, should the rate exceed the maximum prescribed by Section 224, TCI may seek relief.

[47] Pursuant to our rules, refunds are calculated from the date the complaint, as acceptable, was filed. 47 C.F.R. § 1410(c) (1990).

[48] In December 1989, TU Electric filed a contract action against HCI and Heritage in federal district court seeking, *inter alia,* to collect unpaid pole attachment charges. Relying on the doctrine of primary jurisdiction, the court has stayed that proceeding pending our ruling in this proceeding on the jurisdictional question. Texas Utilities Electric Co. v. Heritage Communications Inc. and Heritage Cablevision Associates of Dallas, L.P., No. CA 3-89-3090-R (N.D. Tex. June 19, 1990) (order staying proceeding). In its pleadings in this proceeding, TU Electric urges the Commission to defer to the district court on the jurisdictional question. In light of the court's order, TU Electric's suggestion is moot.

[49] 47 U.S.C. § 415.

[50] *See* Capital Telephone Co., Inc. v. FCC, 777 F.2d 868 (2d Cir. 1985).

[51] *See* 47 C.F.R. § 1.1410(c) (1990).

the parties provide an extensive and sufficient record on which to resolve this dispute. Accordingly, in the exercise of our discretion under Section 1.1411 of the rules,[52] we deny TU Electric's request.

38. *Standing.* TU Electric submits that its licensee under the pole lease agreement is not Heritage, but rather Heritage's predecessor, HCI. TU Electric asserts that it has never agreed to the assignment of the agreement from HCI to Heritage, nor to the subsequent assignment from Heritage to TCI. TU Electric therefore questions Heritage's standing to bring this complaint concerning the provisions of the pole lease agreement. The standing issue is moot, however, since Heritage amended the complaint to add HCI and TCI as complainants. Regardless of TU Electric's refusal to acknowledge or approve the assignment of the pole lease agreement as the Dallas franchise has changed hands, all necessary parties are before the Commission and are bound by this order. We note that TU Electric has accepted payment from all three complainants during the relevant time period for rental of pole space pursuant to the terms of the agreement. We further note that TU Electric joined HCI and Heritage in its contract action in federal district court for unpaid pole attachment charges. Under these circumstances, TU Electric's standing challenge lacks credibility.

IV. CONCLUSION

39. We find that Section 224 empowers the Commission to regulate the pole attachments at issue in this proceeding. We find that Section 224 protects TCI's pole attachments within its franchised service area which support equipment employed to provide nonvideo services in addition to video and other traditional cable television services. We find that TU Electric's imposition of a separate charge for TCI's cable system pole attachments for nontraditional services violates Section 224's prohibition against unjust and unreasonable pole attachment rates, terms and conditions. Therefore, we conclude that a refund of overcharges may be warranted, and we hereby terminate the unjust and unreasonable surcharge established by Amendment No. 2 and Exhibit D of the pole lease agreement.

V. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 224, and Sections 1.1401-1415 of the Commission's rules, 47 C.F.R. §§ 1.1401-1415 (1990), that the complaint of TCI Cablevision of Dallas, Inc. and its predecessors against Texas Utilities Electric Co. IS GRANTED to the extent indicated above.

41. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1) and 224, and Section 1.1410(a) of the Commission's rules, 47 C.F.R. § 1.1410(a) (1990), that the separate annual rental for pole attachments used for other than traditional cable television services, as set forth in Amendment No. 2 and Exhibit D of the pole lease agreement, IS TERMINATED, effective upon release of this order.

42. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 224, and Sections 1.1410(c) and 1.1415 of the Commission's rules, 47 C.F.R. §§ 1.1410(c), 1.1415 (1990), that the parties SHALL ADVISE the Commission within sixty days of release of this order as to the necessity for a refund of any excess charges paid by complainants to TU Electric since June 6, 1989, as indicated above.

43. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2 (1990), that the Request for Declaratory Ruling filed on June 6, 1989, by Heritage Cablevision Associates of Dallas, L.P. and the Texas Cable TV Association, Inc. IS DENIED.

44. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415 (1990), that the Motion to Dismiss filed on July 29, 1989, by Texas Utilities Electric Co. IS DISMISSED with respect to the Request for Declaratory Ruling and otherwise IS DENIED.

45. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.1415 of the Commission's rules, 47 C.F.R. § 1.1415 (1990), that the Motion for Leave to File Brief as Amicus filed on June 10, 1991, by Metropolitan Fiber Systems, Inc., IS GRANTED.

46. IT IS FURTHER ORDERED that the Secretary shall send a copy of this order to U.S. District Court, Northern District of Texas, Dallas Division, Federal Building 14A20, 1100 Commerce Street, Dallas, Texas, 75242, Attn: Ms. Nancy Doherty, Clerk, Reference: No. CA 3-89-3080-R.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[52] 47 C.F.R. § 1.1411 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 2, 1991

UNITED TELECOMMUNICATIONS, INC.
FILES REVISIONS TO COST
ALLOCATION MANUAL

PUBLIC COMMENT INVITED

United Telecommunications, Inc. filed proposed revisions to its permanent cost allocation manual on November 1, 1991. This filing is pursuant to the Chief, Common Carrier Bureau's Order on Reconsideration, *In the Matter of United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs* (DA 91-1252), released October 4, 1991. The file number assigned to United Telecommunications, Inc.'s revisions is AAD 91-74.

Parties may file comments on the proposed revisions to the cost manual no later than **January 2, 1992.** Replies should be filed by **January 17, 1992.** Comments should reference the AAD file number listed above. A copy of each pleading should be sent to Tom Petras, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554, and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Tom Petras, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1991

Released: December 2, 1991

Barbara E. Lewis 91100243
WRKL Radio 8330-M
New City, New York 10970

Dear Ms. Lewis:

We are in receipt of your October 24, 1991, request for a declaratory ruling that the news interview segments of your "Hot Line" program qualify as "bona fide news interviews," exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended.

You contend that Hot Line satisfies the criteria the Commission requires for a "bona fide news interview" exemption under Section 315(a)(2). According to your submission, Hot Line is a one-hour and fifteen minute program broadcast Monday - Saturday on your station. You also state that Hot Line has been broadcast on a regularly scheduled basis since 1964, and that news interviews are regularly scheduled on the program. Hot line is a call-in talk show, conducted by a neutral moderator who interviews guests and then takes questions from the listening audience. Audience questions are controlled by the moderator through the use of a delay mechanism which facilitates selection of questions appropriate to the interview. You also indicate that guests are chosen based on their newsworthiness.

DISCUSSION

Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program qualifies as a "bona fide news interview", the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance and individual's candidacy. *See U.S. News and World Report, L.P.*, 2 FCC Rcd 7101 (1987).

Based on the information contained in your request, it appears that the news interview segments of Hot Line are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). *See, Aspen Institute*, 55 FCC 2d 697, 709 (1975). Accordingly, your instant request as specified above is GRANTED.

Staff action is taken here pursuant to delegated authority.

Sincerely,

Milton O. Gross, Chief
Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mobile Radio New England File No. LMK-91260

Request for Waiver of
Commission Rules

ORDER

Adopted: November 18, 1991; Released: December 2, 1991

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On October 28, 1991, Mobile Radio New England filed with the Private Radio Bureau a request for waiver of Commission Rules concerning Specialized Mobile Radio Service stations. Under requirements established by our *Report and Order*, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991), Mobile Radio New England served specified co-channel licensees with a copy of its request. These licensees were afforded 10 days from the date of filing to challenge the proposal.[1] Dispatch Communications, Inc., one of these affected licensees, seeks an additional 30 days in which to respond to the waiver request.

2. We will grant the 30 day extension.[2] As Dispatch Communications states, the waiver request is voluminous, containing many pages of technical exhibits, interference studies, station applications and related information. Ten days is clearly insufficient to review, analyze and comment upon this volume of material. The extension request, further, is unopposed. Finally, given the scope of the Mobile Radio New England proposal and the number of stations affected, an extension of the comment time will not delay unduly our evaluation and ultimate disposition of the request.

3. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, that all affected parties will have 30 days from the release date of this Order in which to file comments in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

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[1] Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45.

[2] Our grant, of course, extends to all parties served with copies of the waiver request and not simply to Dispatch Communications itself.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-29

In the Matter of

Amendment of Section 73.202(b), RM-7575
Table of Allotments,
FM Broadcast Stations.
(South Burlington, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1991; Released: December 3, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Atlantic Ventures of Vermont L.P. ("petitioner"), former licensee of Station WXXX-FM, South Burlington, Vermont, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1282 (1991), proposing the substitution of Channel 238C3 for Channel 237A at South Burlington, and modification of Station WXXX-FM's license to specify operation on the higher powered channel. James Broadcasting Company, Inc., successor-in-interest to petitioner, filed comments stating its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 238C3 for Channel 237A at South Burlington, since it could enable Station WXXX-FM to expand it coverage area. Channel 238C3 can be allotted to South Burlington in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.6 miles) southwest to avoid prohibitive interference to Station CBOC(FM), Channel 238A, Cornwall, Ontario, and CFLX(FM), Channel 238A, Sherbrook, Quebec, Canada.[2] We note that the allotment to South Burlington does not meet the required mileage separation to the above-noted Canadian stations. Therefore, we have obtained Canadian approval for Channel 238C3 at South Burlington as a specially negotiated short-spaced allotment. As proposed, we will also modify Station WXXX-FM's license to specify operation on Channel 238C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
South Burlington, Vermont	238C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of James Broadcasting Company, Inc., for Station WXXX-FM, South Burlington, Vermont, IS MODIFIED to specify operation on Channel 238C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] James Broadcasting Company, Inc., is now the licensee of Station WXXX-FM pursuant to the Commission grant of the assignment of petitioner's license on April 30, 1990.

[2] The coordinates for Channel 238C3 at South Burlington are North Latitude 44-26-54 and West Longitude 73-13-05. Although the allotment of Channel 238C3 is short-spaced to a construction permit for Station WSHX-FM, Channel 239A, Danville, Vermont, the Danville permit was granted in accordance with the provisions of Section 73.215 of the Commission's Rules, which allows contour protection for short-spaced assignments.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-344

In the Matter of

Amendment of Section 73.202(b), RM-7856
Table of Allotments,
FM Broadcast Stations.
(Maroa, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1991; Released: December 3, 1991

Comment Date: January 24, 1992
Reply Comment Date: February 10, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by TNT Communications ("petitioner") requesting the allotment of Channel 297A to Maroa, Illinois, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 297A to Maroa, Illinois, since it could provide the community with its first local FM transmission service. Channel 297A can be allotted to Maroa in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.6 kilometers (7.8 miles) southwest, in order to avoid a short-spacing to Station WPGU(FM), Channel 296A, Urbana, Illinois.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Maroa, Illinois	–	297A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 24, 1992,** and reply comments on or before **February 10, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jack D. Fowler, Partner
TNT Communications
328 Market Street
P.O. Box 1032
Mt. Carmel, IL 62863

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] The coordinates for Channel 297A at Maroa are North Latitude 39-57-12 and West Longitude 89-03-12.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-21

In the Matter of

Amendment of Section 73.202(b),	RM-6566
Table of Allotments,	RM-6731
FM Broadcast Stations.	
(Grove City, Pennsylvania,	
and Hubbard, Ohio)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1991; Released: December 3, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report and Order* in this proceeding, 4 FCC Rcd 7904 (1989), filed by Western Pennsylvania Radio, Inc. ("Western"), licensee of Station WRKU-FM, Channel 236B, Grove City, Pennsylvania.[1] The *Report and Order* allotted Channel 270A to Hubbard, Ohio, as that community's first local aural service. No oppositions or other reply pleadings were filed in response to Western's petition.[2]

BACKGROUND

2. At the request of Gary P. Hummel, Robert A. Hogue, and Michael Troliano ("Hummel"), the Commission issued a *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 1443 (1989), proposing the allotment of Channel 270A to Grove City, Pennsylvania, as that community's second local FM service. Thereafter, Stephan M. Kramer ("Kramer") filed a timely counterproposal requesting the allotment of Channel 270A to Hubbard, Ohio, as a first local aural service. During the period for filing reply comments to Kramer's counterproposal, Western filed a counterproposal requesting the reallotment of Channel 236B from Grove City to Hubbard and the modification of its license for Station WRKU-FM to specify operation on Channel 236B at Hubbard. Kramer filed a motion to strike Western's counterproposal as untimely.

3. In the *Report and Order*, we took two actions. First, we dismissed Western's counterproposal as late-filed under Section 1.420(d) of the Commission's Rules because it was submitted after the deadline for filing counterproposals in this proceeding.[3] Second, since no alternative channels were available for allotment to either Grove City or Hubbard, we comparatively considered the mutually exclusive proposals to allot Channel 270A to either Grove City or Hubbard. Utilizing the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), we allotted Channel 270A to Hubbard because this would result in a first local service whereas as the allotment of Channel 270A to Grove City would have constituted a second local FM service.

PETITION FOR RECONSIDERATION

4. In its petition, Western contends that the Commission erred in dismissing Western's counterproposal as untimely under Section 1.420(d) of the Rules. In support of this position, it contends that the *Report and Order* in the change of community of license proceeding (*"Change of Community Report"*), 4 FCC Rcd 4870 (1989), supersedes Section 1.420(d) and permits consolidation of Western's counterproposal with the other allotment proposals at issue in the instant proceeding, even though Western's counterproposal was filed after the deadline for filing counterproposals as set forth in Section 1.420(d). It bases this argument on specific language in the *Change of Community Report* indicating that proposals by existing licensees to change their communities of license would be considered in connection with other mutually exclusive allotment proposals.[4] Western argues that, since its counterproposal is mutually exclusive with Kramer's counterproposal, it should have been consolidated and considered by the Commission in the *Report and Order*. Moreover, Western contends that the *Change of Community Report* does not explicitly state that a licensee's proposal to change its community of license must be filed within the confines of the comment period of other allotment proposals.

5. Western also argues that it should not be held to the counterproposal deadline set forth in Section 1.420(d) because it was impossible for Western to know by the counterproposal deadline in the instant proceeding that its counterproposal would be mutually exclusive with Kramer's counterproposal. Western claims that this is because the policy restriction in the *Change of Community Report* which makes its counterproposal mutually exclusive with Kramer's counterproposal was not adopted by the Commission until April 26, 1989, while the deadline for filing counterproposals in the instant proceeding was on April 3, 1989.[5] Finally, Western also contends that the filing deadline set forth in Section 1.420(d) should be

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[1] Public Notice of the filing of Western's petition was given on December 14, 1989, Report No. 1803.

[2] Western also filed a motion for stay of the effective date of the *Report and Order* and of the opening of the filing window for Channel 270A at Hubbard, Ohio. In light of our actions herein, the motion for stay is moot and will be dismissed.

[3] In view of this procedural deficiency, we also granted Kramer's motion to strike Western's counterproposal.

[4] *See* 4 FCC Rcd at 4872 (para. 25) and 4877 n. 21.

[5] Specifically, Western refers to the policy adopted in the *Change of Community Report* which precludes licensees from changing their communities of license if it would result in the removal of the sole local broadcast service. Western states that since its Station WRKU-FM is the only radio station licensed to Grove City, it could not take advantage of the new procedure allowing FM stations to change their communities of license unless there were a replacement channel available for Grove City. Since Kramer's counterproposal to allot Channel 270A to Hubbard precludes the allotment of Channel 270A or any other FM channel to Grove City as a replacement channel, Western contends that its counterproposal is necessarily mutually exclusive with Kramer's counterproposal.

waived because, on a substantive basis, its counterproposal would result in a better arrangement of allotments than the allotment made by the Commission in its *Report and Order*.

DISCUSSION

6. After carefully considering the record in this proceeding, we believe that the *Report and Order* properly dismissed Western's counterproposal as untimely. In the *Report and Order*, we noted that both Section 1.420(d) of the Commission's Rules and paragraph 3(a) of the Appendix to the *Notice of Proposed Rule Making* in this proceeding specifically state that counterproposals shall be advanced in initial comments only and will not be considered if advanced in reply comments. Since Western's counterproposal to reallot Channel 236B from Grove City to Hubbard and to modify Station WRKU-FM's license accordingly was submitted in reply comments on May 4, 1989, and since the deadline for filing counterproposals in this proceeding was April 3, 1989, we found that Western's counterproposal was untimely and must be dismissed.

7. We continue to believe that this result is correct. As we have stated in other cases, Section 1.420(d) is "a fundamental procedural cornerstone for the freezing of the record in allotment proceedings and is critical to the administration of the allotment rule making process."[6] As a result, we have strictly enforced this provision over the years because "[s]uspending the operation of 1.420(d) whenever a proposal filed after the cut-off date for initial comments is alleged to have deserved consideration before that date would destroy the value of 1.420(d) as a source of administrative finality in the allotment process."[7]

8. We see no reason for departing from our practice of strict enforcement of Section 1.420(d) in this case. Although Western contends that the *Change of Community Report* supersedes Section 1.420(d), it is wrong. The *Change of Community Report* contains no language indicating that change of community proposals need not comply with the counterproposal deadlines set forth in Section 1.420(d). On the contrary, the language relied upon by Western in the *Change of Community Report* merely indicates that change of community proposals may conflict with other types of allotment proposals not involving changes of community of license and, when this occurs, the Commission will evaluate such proposals using the FM assignment priorities and policies that have been used in the past, as opposed to an *ad hoc* approach.

9. We also believe that Western's other arguments do not justify waiving Section 1.420(d). Although Western claims that it could not comply with Section 1.420(d) in this proceeding because it was impossible to know by the counterproposal deadline that its counterproposal would conflict with Kramer's, we do not believe that this is a relevant consideration. In the *Notice of Proposed Rule Making* to the *Change of Community Report*, the Commission announced that it would accept such proposals to change community of license pending the final outcome of that proceeding.[8] Thus, Western was on constructive notice that subsequent developments could occur in the change of community proceeding which could affect its plans and could have protected its interests by filing its counterproposal well in advance of the April 3, 1989, cut-off date for counterproposals. Under these circumstances, we do not believe that Western is entitled to consideration of its proposal on the merits. Rather, Western can file a new petition for a change in community of license in which it presents a preferable arrangement of allotments under Section 307(b) and receive consideration on the merits.

10. In view of the foregoing, IT IS ORDERED, That the petition for reconsideration filed by Western Pennsylvania Radio, Incorporated, IS HEREBY DENIED.

11. IT IS FURTHER ORDERED, That the petition to stay the effective date of the *Report and Order* in MM Docket 89-21 filed by Western Pennsylvania Radio, Incorporated, IS HEREBY DISMISSED.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to the party whose application for a construction permit for Channel 270A at Hubbard, Ohio, was granted by an Administrative Law Judge in MM Docket No. 91-188:

Lee W. Shubert, Esq.
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036-3374
(Counsel for Stop 26-Riverbend Productions, Inc.)

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[6] *Vancouver, WA*, 4 FCC Rcd 839, 841 n. 3 (1989).
[7] *Lafayette, LA*, 3 FCC Rcd 4614, 4618 (1988).
[8] *See* 3 FCC Rcd 6890, 6893 n. 17 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-224

In the Matter of

Amendment of Section 73.202(b), RM-7756
Table of Allotments,
FM Broadcast Stations.
(Americus, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 21, 1991; Released: December 3, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 6 FCC Rcd 4732 (1991), issued in response to a petition for rule making filed by Sumter Broadcasting Co., Inc. ("petitioner"), proposing the substitution of Channel 254C3 for Channel 254A at Americus, and modification of its license for Station WPUR(FM) to specify operation on the higher class channel. Petitioner filed untimely comments restating its interest and a motion to accept untimely comments.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 254C3 for Channel 254A at Americus, since it could provide the community with an additional wide coverage area FM service. Channel 254C3 can be allotted to Americus in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WPUR(FM) to specify operation on Channel 254C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Americus, Georgia	234C3, 254C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WPUR(FM), Americus, Georgia, IS MODIFIED, to specify operation on Channel 254C3 in lieu of Channel 254A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sumter Broadcasting Co., Inc., licensee of Station WPUR(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In view of the fact that this proceeding is uncontested, we have accepted the comments for the purpose of allowing petitioner to restate its interest in applying for the channel.

[2] The coordinates for Channel 254C3 at Americus are North Latitude 32-04-51 and West Longitude 84-15-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-345

In the Matter of

Amendment of Section 73.202(b), RM-7109
Table of Allotments,
FM Broadcast Stations.
(Dade City, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 21, 1991; Released: December 3, 1991

Comment Date: January 24, 1992
Reply Comment Date: February 10, 1992

By the Assistant Chief, Allocations Branch

1. The Commission has before it the petition for rule making filed by Daniel A. and Paula C. Bernath ("petitioners"), seeking the allotment of Channel 241A to Dade City, Florida, as that community's first local FM service. Petitioners states their intention to apply for the channel, if allotted.

2. We believe the public interest would served by proposing the allotment of Channel 241A to Dade City, since it could provide that community with its first local FM channel. Channel 241A can be allotted to Dade City in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.4 miles) east,[1] in order to avoid short-spacings to Station WMTX(FM), Channel 239C1, Clearwater, Florida, and Station WRXK(FM), Channel 241C, Bonita Springs, Florida. We note that Channel 241A at Dade City is short-spaced to an application (BMLH-900223KC) for Channel 241C, Bonita Springs, Florida. Therefore, we will serve the licensee of Station WRXK(FM) with a copy of this *Notice*.

3. In view of the fact that Dade City, Florida, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Dade City, Florida	--	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file coments on or before **January 24, 1992,** and reply comments on or before **February 10, 1992,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Daniel A. Bernath, and
Paula C. Bernath, Partners
7305 Sheryl Hill
Holiday, Florida 34691
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to Beasley Broadcasting of Western Florida, Inc., P.O. Box 9600, Estero, Florida 33928 (licensee of Station WRXK(FM)).

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates are North Latitude 28-22-15 and West Longitude 82-08-05.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-267

In the Matter of

Amendment of Section 73.606(b), RM-7785
Table of Allotments,
TV Broadcast Stations.
(Kennett, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 21, 1991; Released: December 3, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a *Notice of Proposed Rule Making*, 6 FCC Rcd 5369 (1991), issued in response to a petition filed by New Life Evangelistic Center, Inc. ("petitioner"), proposing the allotment of UHF Television Channel 58 to Kennett, Missouri, as that community's first local television service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Kennett (population 10,145),[1] seat of Dunklin County (population 36,324), is located in southeastern Missouri approximately 265 kilometers (165 miles) south of St. Louis, Missouri.

3. We believe the public interest would be served by allotting Channel 58 to Kennett, Missouri, since it would provide the community with its first local television transmission service. As indicated in the *Notice*, UHF Television Channel 58 can be allotted to Kennett in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules provided there is a site restriction 15.1 kilometers (9.4 miles) south of the community.[2] The site restriction is required to avoid the freeze area of St. Louis, Missouri.[3] The allotment of Channel 58 to Kennett will also require a plus offset.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1992,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kennett, Missouri	58+

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Population figures are from the 1980 U.S. Census.

[2] The coordinates for Channel 58 at Kennett are 36-06-09 and 90-02-25.

[3] The Commission has imposed a freeze on new television allotments in certain metropolitan areas. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

[4] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n. 1 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Request for Declaratory Ruling

By

Fox Television Stations, Inc.

STAFF RULING

Adopted: November 25, 1991; Released: December 2, 1991

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling filed by Fox Television Stations Inc., licensee of Washington, D.C., television station WTTG ("Fox"). Fox asks that its program, "Not Just News," be held exempt from Section 315 of the Communications Act because it is a "bona fide newscast." Based on the information before us, it appears that "Not Just News" qualifies for the bona fide newscast exemption.

2. Fox states that "Not Just News" is produced by WTTG and syndicated by Twentieth Television Distribution, a division of Twentieth Century Fox Film Corp. The program, which premiered on September 7, 1991, is a weekly half-hour program, designed for an audience of older children. According to Fox, "Not Just News" covers national and international news events and topical issues in a format "much like a traditional newscast," featuring "one adult anchor, who will conduct interviews with prominent individuals, including scientists, educators, governmental officials, some of whom might be political candidates, and others on current newsworthy topics of interest to the child audience." Fox also explains that "Not Just News" has a studio audience and that "[t]here is a certain amount of audience participation, as when a child from the audience matches wits with the expert in the 'Match Wits' segment, however, the adult anchor is in full control of the program at all times." There will also be taped and live feature segments on a wide variety of newsworthy subjects. Fox states that "[i]ts entire content, including news interviews, will be under the sole control of the licensee, WTTG."

DISCUSSION

3. In 1959, Congress amended the Communications Act to exempt, from the equal opportunities provision of Section 315, appearances by legally qualified candidates during the following four categories of bona fide news programming:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). Congress removed the inhibiting effect of the equal opportunities obligation upon bona fide news programming to encourage increased news coverage of political campaign activity. Rather than define precisely what it meant by "news," Congress chose to leave the task of interplreting the scope of each exemption to the Commission. *See* 105 Cong. Rec. 16227 (1959)(Rep. Celler); 105 Cong. Rec. 14455 (1959)(Sen. Pastore). Although Congress did provide some indication of what it envisioned structurally for some of the exemptions (*e.g.* bona fide news interviews must be regularly scheduled), it did not specify any requisite characteristics for the bona fide newscast exemption. Congress did articulate that the common characteristic of all of the news exemptions is "bona fide news value." Conf. Rep. No. 1069, 86th Cong., 1st Sess. at 4 (1959); 105 Cong. Rec. 14442 (Sen. Pastore). Congress qualified each exemption with the term "bona fide," which the legislative history demonstrates was intended to emphasize that bona fide news programming be genuinely newsworthy and not designed by the broadcaster for the purpose of advancing or harming any particular candidacies. *See* 105 Cong. Rec. 17782 (1959).

4. The Commission has ruled that a wide variety of formats can be treated as bona fide newscasts. *Paramount Communications, Inc.*, 5 FCC Rcd 4627 (1990) ("Hardcopy"); *Paramount Pictures Corp.*, 64 RR 2d 600 (M.M. Bur. 1988)("Entertainment Tonight" and "Entertainment This Week"); *Rev. Donald L. Lanier*, 37 FCC 2d 952 (B/c Bur. 1972)("The Church Today"). In ruling that "Entertainment Tonight" and "Entertainment This Week" were bona fide newscasts, the Commission, through its Mass Media Bureau, stated that, in terms of format, the principal consideration should be "whether the program reports news of some area of current events . . . in a manner similar to more traditional newscasts." 64 RR 2d at 601. The Commission has thus specifically declined to evaluate the relative quality or significance of the topics and stories selected for newscast coverage, appropriately relying instead on good faith news judgment. The utilization of interviews, on-the-spot coverage, and film or tape footage in the context of some stories presented by "Not Just News" is not a basis for denying a newscast exemption since these various approaches to news reporting are typical of the more traditional newscast formats.

5. Finally, we have no basis for believing that the stories covered by "Not Just News" are selected for any reason other than their genuine newsworthiness.

6. Accordingly, on the basis of the information before the Commission, it appears that "Not Just News," in the format described by Fox in its request, should be accorded the bona fide newscast exemption. This result is fully consistent with the statutory objective of the Section 315 exemptions -- to enhance news coverage of the political arena.

7. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 25, 1991

Released: December 4, 1991

John Price, Esq. 8330-B
8140 Knue Road, Suite 107 C5-677
Indianapolis, IN 46250

Dear Mr. Price:

This is in response to your complaint against WFBQ-FM, Indianapolis, IN, alleging violation of the Commission's personal attack rule, 47 C.F.R. Section 73.1920. You subsequently petitioned the Commission to revoke or suspend WFBQ-FM's license for its violation of the "equal opportunities" provision in Section 315(a) of the Communications Act, 47 U.S.C. Section 315(a), and the prohibition against indecency contained in 18 U.S.C. Section 1464.

Although your second filing was titled a "Verified Petition for Revocation of License...", neither the Communications Act nor the Commission's rules contain any provision for the filing of petitions to revoke. Therefore, we will consider your petition a complaint and handle it pursuant to our normal complaint procedures.

After reviewing your filings, WFBQ-FM's response to our letter of inquiry, and your replies thereto, we conclude that WFBQ-FM has violated neither the personal attack rule nor the requirements mandated by the equal opportunities provision. With respect to your allegations regarding indecent material, we have referred this aspect of your complaint to the appropriate personnel within the Mass Media Bureau for further consideration. We note that this particular allegation was not raised in either your initial personal attack complaint or the subsequent petition, but rather was addressed for the first time in your reply to the licensee's response to our inquiry. You will be advised of any further Commission action concerning this allegation as soon as possible.

PERSONAL ATTACK

Section 73.1920 of the Commission's rules reads in pertinent part:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group, the licensee shall within a reasonable period of time and in no event later than one week after the attack, transmit to the persons or group attacked:

(1) Notification of the date, time and identification of the broadcast;

(2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and

(3) An offer of a reasonable opportunity to respond over the licensee's facilities.

You claim that the alleged attack occurred on the morning of the Indiana primary election, in which you were running for the state senate, during a "live remote" of the "Bob and Tom" show from a parking lot in front of your campaign headquarters. You believe that references to you during the broadcast as a "Yankee Doodle Hitler, " among a number of other comments comparing you to a Nazi, constituted an attack upon your character, integrity, and like personal qualities.

In response to our inquiry of the licensee, WFBQ-FM argues that in light of the Commission's action in *Syracuse Peace Council,* 2 FCC Rcd. 5043 (1987), *aff'd sub nom. Meredith Broadcasting, Inc. v. FCC,* 867 F.2d 654 (D.C. Cir. 1989, *cert. denied,* 110 S. Ct. 717 (1990), the personal attack rule is no longer valid. Alternatively, WFBQ-FM argues that even if the Commission believes the personal attack rule was unaffected by its action in *Syracuse Peace Council,* the references to you during the "Bob and Tom" program were in the form of parody and were not intended to be a serious discussion of a controversial issue. As such, the licensee contends that the remarks did not constitute personal attacks. Moreover, the station states that, despite its belief that no obligations under the personal attack rule were triggered by the subject programming, it nonetheless offered you a timely and reasonable opportunity to respond to the broadcast on two separate occasions. The licensee provided two letters in which it offered you an opportunity to appear on the station, the first letter dated three days after the alleged attack.

Without reaching a determination as to the continued validity of the personal attack rule or whether the alleged attack occurred during a discussion of a controversial issue, we believe that the station did not violate the personal attack rule. Personal attacks are not prohibited by the rule. The personal attack rule requires that an opportunity to respond on-the-air to a personal attack be offered to the attacked person or group within one week of the attack. Although WFBQ-FM believed that no personal attack had taken place, the station made its first offer to respond three days after the program, which you apparently rejected. Because the station provided you with response time, and thereby satisfied the rule's requirement, no further action by the Commission is warranted. Although you contend that WFBQ failed to provide a complete tape of the broadcast in question, it appears that you already had in your possession all but twenty minutes of the entire morning program and were on notice of its airing, as envisioned by the personal attack rule.

With respect to your rejection of WFBQ's offer of response time because it came after the election, the personal attack rule does not contemplate an acceleration of its timing requirements when the person attacked is involved in an imminent election campaign.

EQUAL OPPORTUNITIES

Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (a candidate's appearance by picture or voice), it must afford equal opportunities to other such candidates for that office.

As noted, Section 315 applies to appearances by competing legally qualified candidates *only*. Your complaint describes programming which did not involve any candidate appearances. Thus, Section 315 is inapplicable and WFBQ-FM was under no obligation to provide you with "equal opportunities" as a result of the particular "Bob and Tom" program you identified.

ACCORDINGLY, for the reasons discussed above, your personal attack and equal opportunities complaints against WFBQ-FM ARE DENIED.

Staff action is taken here pursuant to delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [(47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C., 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to parties to the complaint. See Commission Rule 1.1115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Applications of

Champion Industries, Inc. File Nos. 2814-CM-P-83
2772-CM-P-83
2816-CM-P-83
2821-CM-P-83
2715-CM-P-83

For Authority to
Construct and Operate
Multichannel
Multipoint Distribution
Service Stations
on the F-group
Channels at Pittsburgh and Lancaster,
Pennslyvania, Portland, Oregon,
Provo-Orem, Utah and Columbus, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: December 4, 1991

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns petitions to deny filed against the above-referenced applications of Champion Industries, Inc. (Champion) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Pittsburgh and Lancaster, Pennsylvania, Portland, Oregon, Provo-Orem, Utah and Columbus, Ohio markets. Champion's Pittsburgh, Lancaster, Portland, Provo-Orem and Columbus MMDS applications were selected for qualification review as the result of Commission lotteries. The petitions were filed by the Committee for Fair MDS Lotteries (Committee). For the reasons discussed below, we deny the petitions.

ARGUMENTS

2. The Committee generally contends that Champion and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill), [2] sought to gain control over both MMDS channel groups in the nation's major markets by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, the Committee alleges, these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant has more than one chance in an MMDS lottery in a given market. The Committee requests an evidentiary hearing on Champion's lottery-winning Pittsburgh, Lancaster, Portland, Provo-Orem and Columbus applications because, it argues, the following circumstances raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind Champion's applications in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). The Committee argues that these same circumstances also raise a substantial and material question of fact as to whether Champion filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule:

> (1) the fact that at the time the applications were filed, Noel Rudd, President, co-director, and 100% stockholder of Champion, was Executive Vice President of MerrillCom;
>
> (2) Merrill's involvement in the initiation, preparation, payment and filing of Champion's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;
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> (3) technical and other similarities of Champion's applications to the "cookie cutter" applications of the other fifteen applicants;
>
> (4) similarities in the articles of incorporation of Champion and the other fifteen applicants and the fact that certain individuals participated in the incorporation of all of these applicants;
>
> (5) Merrill's involvement in obtaining identical financing arrangements for Champion and the other fifteen applicants; and
>
> (6) the "Letter of Understanding" between Champion and Merrill which states that Merrill will provide programming services to Champion, if Champion is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill. [3]

The Committee also maintains that Champion violated the affiliation disclosure requirement of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900, by failing to submit a statement disclosing the business relationship between Noel Rudd and Merrill, Champion's intended or likely subscriber.

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[1] The fifteen other applicants are B.F. Investments, Inc. (renamed HiSol Limited Partnership), Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc. Each of these fifteen applicants filed an MMDS application in each of the above-captioned markets.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom)." Merrill" will be used herein to refer to either Bruce Merrill or MerrillCom.

[3] Similar "Letters of Understanding" were filed by the other fifteen applicants.

3. In its Replies, Champion argues that an evidentiary hearing is unnecessary to determine whether it violated the Commission's real party-in-interest and one-to-a-market rules because all relevant facts are before the Commission and are undisputed. Champion further argues that the record does not support the Committee's allegation that Champion violated the real party-in-interest and one-to-a-market rules.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline)* ; *Gencom, Inc. v. FCC*, 832 F.2d 171,180-81 (D.C. Cir. 1987) (*Gencom); Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (*Jazz).*

5. The Commission must perform the *prima facie* inquiry on the basis of the petition to deny and supporting affidavits alone and on the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, the *prima facie* showing has been made in each of the petitions because the Commission has determined that an application will be dismissed as against the public interest, convenience and necessity if it finds that an applicant failed to disclose the real party-in-interest or violated the one-to-a-market rule. *See, e.g., United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom.; KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974).

6. Having found that the petitions comport with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by the Committee. [4] In making this determination, the Commission must consider the totality of the evidence presented (*i.e.*, the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, in addition to the petitioner's evidence). *Astroline*, 857 F.2d at 1561; *Gencom*, 832 F.2d at 181; *Jazz* 775 F.2d at 394. The evidence before us is sufficient for us to make an informed and reasoned decision on the merits of the Committee's allegations without engaging in a further fact finding process. The material facts underlying the asserted real party-in-interest and one-to-a-market rule violations in this case are uncontroverted. Moreover, as the Commission noted in *Virginia Communications, Inc.*, 2 FCC Rcd 1895, 1900 (1987) (*VCI),"* petitioner and respondents alike have had more than sufficient opportunities to advance their respective arguments." In short, the Committee has not raised any substantial and material questions of fact.

7. *Real Party-in-Interest Issue.* The test for determining whether a party is a real party-in-interest [5] is "whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962. There is no evidence that Bruce Merrill has any ownership interest in Champion's applications. *VCI* at 1898. Furthermore, none of the circumstances presented by the Committee (*e.g.*, Noel Rudd's relationship as the Executive Vice President of MerrillCom, Bruce Merrill's assistance with Champion's applications, and the Letter of Understanding), either individually or collectively, place Merrill in an actual or potential position to control the operation of Champion's MMDS stations. *VCI* at 1898-99. Consequently, we cannot find a violation of the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. [6] The Committee does not contend that Merrill has in Champion, either directly or indirectly, any of the interests specified by the plain language of Section 21.901(d)(2). Nevertheless, the Committee argues that Merrill holds a "cognizable interest" in Champion "similar" to that of an "officer or director" and to that of

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[4] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[5] Section 21.13(a)(1) of the Commission's Rules requires an applicant for a license to "[d]isclose fully the real party (or parties) in interest, including . . . a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant." 47 C.F.R. § 21.13(a)(1).

[6] At the time the subject applications and the related petitions to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

47 C.F.R. § 21.901(d)(2).

a "beneficiary." First, the evidence does not demonstrate that Bruce Merrill holds in Champion an interest "similar" to that of an officer or director, particularly in light of Champion's rebuttal that "MerrillCom has been afforded no rights whatsoever to be involved in the management or operation of [Champion's] MMDS facilities." Second, although Merrill stands to benefit in a broad sense due to the programming arrangement in the Letter of Understanding between Champion and Merrill, this benefit is no different from the benefit that every other customer/programmer of Champion will receive. As the Commission found in *VCI,* "Such ordinary customer interests cannot be construed as a cognizable interest in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899. [7]

9. *Affiliation Disclosure Issue.* Section 21.900 requires an applicant to disclose, at the time of filing, "any affiliation or relationship to any intended or likely subscriber or program originator." The terms "affiliation" and "relationship" have been defined by the Commission, for purposes of Section 21.900, as "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship." *MDS Report and Order,* 45 FCC 2d 616,618 (1974). Therefore, Champion violated Section 21.900 by failing to disclose that Noel Rudd was the Executive Vice President of MerrillCom.

CONCLUSION

10. We find that the Committee has not raised a substantial and material question of fact requiring designation for hearing as to whether Champion violated the Commission's real party-in-interest or one-to-a-market rules. The evidence before us is sufficient for us to make an informed and reasoned decision on these issues. Based on this evidence, we find no violation by Champion of the Commission's real party-in-interest and one-to-a-market rules.

11. We do, however, find a violation of the affiliation disclosure requirement of Section 21.900 of the Commission's Rules. Although Champion failed to disclose its business relationship to MerrillCom at the time of filing, disclosure of this business relationship was revealed in this proceeding. Consequently, we find that it is in the public interest to impose no further condition on any MMDS authorization Champion obtains for the subject markets than the condition previously imposed by the Commission in *VCI.* This condition requires Champion to hold service out to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [Champion] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the petitions filed by the Committee for Fair MDS Lotteries against the applications of Champion Industries, Inc. at Pittsburgh and Lancaster, Pennsylvania, Portland, Oregon, Provo-Orem, Utah, and Columbus, Ohio ARE DENIED.

13. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[7] We also find that, although Noel Rudd was an officer of MerrillCom as well as an officer and owner of Champion, Champion did not violate the one-to-a-market rule through Noel Rudd because MerrillCom has not been found by the Commission to be the real party-in-interest behind or to have a "cognizable" or "similar cognizable" interest in any of the other applicants in the subject markets. *VCI,* 2 FCC Rcd 1895.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Applications of

B. F. Investments, Inc. File Nos. 1391-CM-P83
1436-CM-P83
1512-CM-P83

For Authority to
Construct and Operate
Multichannel Multipoint Distribution
Service Stations on the F-group
Channels at Flint, Michigan,
Louisville, Kentucky
and Toledo, Ohio)

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: December 4, 1991

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns petitions to deny filed against the above-referenced applications of B.F. Investments, Inc. (BFI) [1] to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Flint, Michigan, Louisville, Kentucky and Toledo, Ohio markets. BFI's Flint, Louisville and Toledo MMDS applications were selected for qualification review as the result of Commission lotteries. The petitions were filed by the Committee for Fair MDS Lotteries and Continental Cablevision of Ohio, Inc. (Petitioners). For the reasons discussed below, we deny the petitions.

ARGUMENTS

2. Petitioners generally contend that BFI and fifteen other MMDS applicants, [2] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill), [3] sought to gain control over both MMDS channel groups in the nation's major markets by filing, under different corporate names, virtually identical applications in each of these markets. By doing so, Petitioners allege, these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant has more than one chance in an MMDS lottery in a given market. Petitioners request an evidentiary hearing on BFI's lottery-winning Flint, Louisville and Toledo applications because, they argue, the following circumstances raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind BFI's applications in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). Petitioners argue that these same circumstances also raise a substantial and material question of fact as to whether BFI filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule:

> (1) the fact that at the time the applications were filed, Bruce Francis, President, co-director, and 100% stockholder of BFI, was an employee and officer of MerrillCom;
>
> (2) Merrill's involvement in the initiation, preparation, payment and filing of BFI's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;
>
> (3) technical and other similarities of BFI's applications with the "cookie cutter" applications of the other fifteen applicants;
>
> (4) similarities in the articles of incorporation of BFI and the other fifteen applicants and the fact that certain individuals participated in the incorporation of all of these applicants;
>
> (5) Merrill's involvement in obtaining identical financing arrangements for BFI and the other fifteen applicants; and
>
> (6) the "Letter of Understanding" between BFI and Merrill which states that Merrill will provide programming services to BFI if BFI is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill. [4]

The Committee for Fair MMDS Lotteries also maintains that BFI violated the affiliation disclosure requirement of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900, by failing to submit a statement disclosing the business relationship between Bruce Francis and Merrill, BFI's intended or likely subscriber.

3. In its Replies, BFI argues that an evidentiary hearing is unnecessary to determine whether it violated the Commission's real party-in-interest and one-to-a-market rules because all relevant facts are before the Commission and are undisputed. BFI further argues that the record does not support Petitioner's allegations that BFI violated the real party-in-interest, one-to-a-market and affiliation disclosure rules.

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[1] BFI was recently renamed HiSol Limited Partnership.

[2] The fifteen other applicants are Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc. Each of these fifteen applicants filed an MMDS application in each of the above-captioned markets.

[3] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used herein to refer to either Bruce Merrill or MerrillCom.

[4] Similar "Letters of Understanding" were filed by the other fifteen applicants.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline*); *Gencom, Inc. v. FCC,* 832 F.2d 171, 180-81 (D.C. Cir. 1987) (*Gencom*); *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C. Cir. 1985) (*Jazz*).

5. The Commission must perform the *prima facie* inquiry on the basis of the petition to deny and supporting affidavits alone and on the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, the *prima facie* showing has been made in each of the petitions because the Commission has determined that an application will be dismissed as against the public interest, convenience and necessity if it finds that an applicant failed to disclose the real party-ininterest or violated the one-to-a-market rule. *See, e.g., United American Telecasters, Inc. v. FCC,* 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 2182 (1987); *David Laustsen and Broadcast Data Corp.,* 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.,* 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified,* 102 FCC 2d 288 (1985), *aff'd sub nom.; KOWL, Inc.,* 49 FCC 2d 962, 964 (Rev. Bd. 1974).

6. Having found that the petitions comport with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by Petitioners.[5] In making this determination, the Commission must consider the totality of the evidence presented (*i.e.,* the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, as well as the petitioner's evidence). *Astroline,* 857 F.2d at 1561; *Gencom,* 832 F.2d at 181; *Jazz* 775 F.2d at 394. The evidence before us is sufficient for us to make an informed and reasoned decision on the merits of Petitioner's allegations without engaging in a further fact-finding process. The material facts underlying the asserted real party-in-interest and one-to-a-market rule violations in this case are uncontroverted. Moreover, as the Commission noted in *Virginia Communications, Inc.,* 2 FCC Rcd 1895, 1900 (1987) (*VCI*), "petitioner[s] and respondents alike have had more than sufficient opportunities to advance their respective arguments." In short, Petitioners have not raised any substantial and material questions of fact.

7. *Real Party-in-Interest Issue.* The test for determining whether a party is a real party-in-interest[6] is "whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.,* 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.,* 49 FCC 2d 962. There is no evidence that Bruce Merrill has any ownership interest in BFI's applications. *VCI* at 1898. Furthermore, none of the circumstances presented by Petitioners (*e.g.,* Bruce Francis' relationship as an employee and officer of MerrillCom, Merrill's assistance with BFI's applications, and the Letter of Understanding), either individually or collectively, place Merrill in an actual or potential position to control the operation of BFI's MMDS stations. *VCI* at 1898-99. Consequently, we cannot find that BFI violated the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* We also cannot find that BFI violated the the Commission's one-to-a-market rule. [7] Petitioners. do not contend that Merrill has in BFI, either directly or indirectly, any of the interests specified by the plain language of Section 21.901(d)(2). Nevertheless, Petitioners argue that Merrill holds a "cognizable interest" in BFI "similar" to that of an "officer or director" and to that of a "beneficiary." First, the evidence does not demonstrate that Bruce Merrill holds in BFI an interest "similar" to that of an officer or director, particularly in light of BFI's rebuttal that "neither Bruce Merrill nor MerrillCom has the express or implied authority to make any decisions concerning the operation of [BFI's MMDS] facilities." Second, although Merrill stands to benefit in a broad sense due to the programming arrangement in the Letter of Understanding between BFI and Merrill, this benefit is no different from the benefit that every other customer/programmer of BFI will receive. As the Commission found in *VCI,* "Such ordinary customer interests

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[5] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." *Jazz,* 775 F.2d at 395.

[6] Section 21.13(a)(1) of the Commission's Rules requires an applicant for a license to "[d]isclose fully the real party (or parties) in interest, including . . . a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant." 47 C.F.R. § 21.13(a)(1).

[7] At the time the subject applications and the related petitions to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.
>
> 47 C.F.R. § 21.901(d)(2).

cannot be construed as a cognizable interest in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899. [8]

9. *Affiliation Disclosure Issue.* Section 21.900 requires an applicant to disclose at the time of filing "any affiliation or relationship to any intended or likely subscriber or program originator." The terms "affiliation" and "relationship" have been defined by the Commission, for purposes of Section 21.900, as "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship." *MDS Report and Order,* 45 FCC 2d 616, 618 (1974). Therefore, BFI violated Section 21.900 by failing to disclose that Bruce Francis was an employee and officer of Merrill.

CONCLUSION

10. We find that Petitioners have not raised a substantial and material question of fact requiring designation for hearing as to whether BFI violated the Commission's real party-in-interest or one-to-a-market rules. The evidence before us is sufficient for us to make an informed and reasoned decision on these issues. Based on this evidence, we find no violation by BFI of the Commission's real party-in-interest and one-to-amarket rules.

11. We do, however, find a violation of the affiliation disclosure requirement of Section 21.900 of the Commission's Rules. Although BFI failed to disclose its business relationship to MerrillCom at the time of filing, disclosure of this relationship was revealed in this proceeding. Consequently, we find that it is in the public interest to impose no further condition on any MMDS authorization BFI obtains for the subject markets than the condition previously imposed by the Commission in *VCI.* This condition requires BFI to hold service out to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [BFI] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the petitions filed by the Committee for Fair MDS Lotteries and Continental Cablevision of Ohio, Inc. against the applications of B. F. Investments, Inc. at Flint, Michigan, Louisville, Kentucky and Toledo, Ohio ARE DENIED.

13. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[8] We also find that, although Bruce Francis was an employee and officer of MerrillCom as well as an officer and owner of BFI, BFI did not violate the one-to-a-market rule through Bruce Francis because MerrillCom has not been found by the Commission to be the real party-in-interest behind or to have a "cognizable" or "similar cognizable" interest in any of the other applicants in the subject markets. *VCI,* 2 FCC Rcd 1895.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Applications of

Mettler	File Nos. 8228-CM-P83
Communications, Inc.	8418-CM-P83

For Authority to
Construct and Operate
Multichannel
Multipoint Distribution
Service Stations on the F-group
Channels at Allentown,
Pennsylvania and Waco, Texas

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: December 4, 1991

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This *Memorandum Opinion and Order* concerns a petition filed against the above-referenced applications of Mettler Communications, Inc. (Mettler) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels in the Allentown, Pennsylvania and Waco, Texas markets. Mettler's Allentown and Waco MMDS applications were selected for qualification review as the result of Commission lotteries. The petition was filed by the Committee for Fair MDS Lotteries (Committee). For the reasons discussed below, we deny the petition.

ARGUMENTS

2. The Committee generally contends that Mettler and fifteen other MMDS applicants,[1] acting in a coordinated effort and under the direction of Bruce Merrill (Merrill),[2] sought to gain control over both MMDS channel groups in the nation's major markets by filing, under different corporate names, virtually identical application in each of these markets. By doing so, the Committee alleges, these sixteen applicants violated the Commission's rules which were designed to ensure that no one applicant has more than one chance in an MMDS lottery in a given market. The Committee requests an evidentiary hearing on Mettler's lottery-winning Allentown and Waco applications because, it argues, the following circumstances raise a substantial and material question of fact as to whether Merrill is the undisclosed real party-in-interest behind Mettler's applications in violation of Section 21.13(a)(1) of the Commission's Rules, 47 C.F.R. § 21.13(a)(1). The Committee argues that these same circumstances also raise a substantial and material question of fact as to whether Mettler filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule:

> (1) Merrill's involvement in the initiation, preparation, payment and filing of Mettler's applications, as well as the applications of the other fifteen applicants, and his assistance in the selection of markets by these applicants;
>
> (2) technical and other similarities of Mettler's applications to the "cookie cutter" applications of the other fifteen applicants;
>
> (3) similarities in the articles of incorporation of Mettler and the other fifteen applicants and the fact that certain individuals participated in the incorporation of all of these applicants;
>
> (4) Merrill's involvement in obtaining identical financing arrangements for Mettler and the other fifteen applicants; and
>
> (5) the "Letter of Understanding" between Mettler and Merrill which states that Merrill will provide programming services to Mettler if Mettler is a successful applicant, in consideration for the pre-filing services performed by Bruce Merrill. [3]

3. In its Reply, Mettler argues that an evidentiary hearing is unnecessary to determine whether it violated the Commission's real party-in-interest and one-to-a-market rules because all relevant facts are before the Commission and are undisputed. Mettler further argues that the record does not support the Committee's allegations that Mettler violated the real party-in-interest and one-to-a-market rules.

DISCUSSION

4. *Hearing Request.* To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show. .. that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission

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[1] The fifteen other applicants are B.F. Investments, Inc. (recently renamed HiSol Limited Partnership), Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Microwave Video Services, Inc., Multi-Micro (DBA), Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc. Each of these fifteen applicants filed an MMDS application in each of the above-captioned markets.

[2] Bruce Merrill is Chairman of the Board of Directors and 100% shareholder of Merrill Communications, Inc. (MerrillCom). "Merrill" will be used herein to refer to either Bruce Merrill or MerrillCom.

[3] Similar "Letters of Understanding" were filed by the other fifteen applicants.

determines that a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline)*; *Gencom, Inc. v. FCC*, 832 F.2d 171, 180-81 (D.C. Cir. 1987) (*Gencom)*; *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (*Jazz)*.

5. The Commission must perform the *prima facie* inquiry on the basis of the petition to deny and its supporting affidavits alone and on the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, the *prima facie* showing has been made in the petition because the Commission has determined that an application will be dismissed as against the public interest, convenience and necessity if it finds that an applicant failed to disclose the real party-ininterest or violated the one-to-a-market rule. *See, e.g., United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom.; KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974).

6. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by the Committee.[4] In making this determination, the Commission must consider the totality of the evidence presented (*i.e.*, the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, in addition to the petitioner's evidence). *Astroline*, 857 F.2d at 1561; *Gencom*, 832 F.2d at 181; *Jazz* 775 F.2d at 394. The evidence before us is sufficient for us to make an informed and reasoned decision on the merits of the Committee's allegations without engaging in a further fact-finding process. The material facts underlying the asserted real party-in-interest and one-to-a-market rule violations in this case are uncontroverted. Moreover, as the Commission noted in *Virginia Communications, Inc.*, 2 FCC Rcd 1895, 1900 (1987) (*VCI)*, "petitioner and respondents alike have had more than sufficient opportunities to advance their respective arguments." In short, the Committee has not raised any substantial and material questions of fact.

7. *Real Party-in-Interest Issue.* The test for determining whether a party is a real party-in-interest[5] is "whether that party has an ownership interest in the application or will be in a position, actually or potentially, to control the operation of the station." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962. There is no evidence that Bruce Merrill has any ownership interest in Mettler's applications. *VCI* at 1898. Furthermore, none of the circumstances presented by the Committee (*e.g.*, Merrill's assistance with Mettler's applications and the Letter of Understanding), either individually or collectively, place Merrill in an actual or potential position to control the operation of Mettler's MMDS stations. *VCI* at 1898-99. Consequently, we cannot find a violation of the Commission's real party-in-interest rule.

8. *One-to-a-Market Issue.* The evidence presented is also insufficient to find a violation of the Commission's one-to-a-market rule. [6] The Committee does not contend that Merrill has in Mettler, either directly or indirectly, any of the interests specified by the plain language of Section 21.901(d)(2). Nevertheless, the Committee argues that Merrill holds a "cognizable interest" in Mettler "similar" to that of an "officer or director" and to that of a "beneficiary." First, the evidence does not demonstrate that Merrill holds in Mettler an interest "similar" to that of an officer or director, particularly in light of Mettler's rebuttal that "Bruce Merrill is not now, nor will he ever be, in a position to actually or potentially control the operation of [Mettler's MMDS] stations." Second, although Merrill stands to benefit in a broad sense due to the programming arrangement in the Letter of Understanding between Mettler and Merrill, this benefit is no different from the benefit that every other customer/programmer of Mettler will receive. As the Commission found in *VCI*, "Such ordinary customer interests cannot be construed as a cognizable interest in an MMDS application for § 21.901(d)(2) purposes." 2 FCC Rcd at 1899.

CONCLUSION

9. We find that the Committee has not raised a substantial and material question of fact requiring designation for hearing as to whether Mettler violated the Commission's real party-in-interest or one-to-a-market rules. The evidence before us is sufficient for us to make an informed

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[4] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[5] Section 21.13(a)(1) of the Commission's Rules requires an applicant for a license to "[d]isclose fully the real party (or parties) in interest, including . . . a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant." 47 C.F.R. § 21.13(a)(1).

[6] At the time the subject applications and the related petitions to deny were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

47 C.F.R. § 21.901(d)(2).

and reasoned decision on these issues. Based on this evidence, we find no violation by Mettler of the Commission's real party-in-interest and one-to-a-market rules.

10. Mettler is reminded that, in *VCI*, the Commission imposed a condition on any MMDS authorization issued to Mettler requiring Mettler to hold the service out to the public without unreasonable preference or discrimination for 60 days from the date its formal tariffs are effective. "During that 60 day period, [Mettler] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer/programmer." *VCI* at 1900.

ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that the petition filed by the Committee for Fair MDS Lotteries against the applications of Mettler Communications, Inc. at Allentown, Pennsylvania and Waco, Texas IS DENIED.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-5

In the Matter of

Amendment of Part 94 of the
Commission's Rules to Permit
Private Video Distribution Systems
of Video Entertainment Access
to the 18 GHz Band

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: December 4, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it two Petitions for Reconsideration filed in response to various aspects of the action taken in the *Report and Order* in PR Docket No. 90-5. [1] In the first petition to be considered, the Utilities Telecommunications Council (UTC) challenges the Commission's decision to eliminate the four-channel-per-transmitter-site limitation contained in 47 C.F.R. § 94.15(g) as it pertains to the use of the 6 MHz wide, point-to-point frequencies in the 18 GHz band for the distribution of video entertainment material. [2] UTC contends that the record does not support the Commission's decision to eliminate the channel limitation for the distribution of video entertainment programming while retaining it for other traditional microwave uses.[3] In the second petition, Microwave Radio Corporation (MRC) expresses concern that certain portions of the Commission's clarification of 47 C.F.R. § 94.9 may be construed as a change in existing policy that would effectively prohibit television broadcasters from using the 21.8-22.4 and 23.0-23.6 GHz bands for studio-to-transmitter links.[4] MRC requests the Commission to modify new Section 94.9 to make plain that no such change in policy has occurred.[5] For the reasons that follow, UTC's Petition is denied and MRC's request for clarification is granted.

II. BACKGROUND/DISCUSSION

2. In the *Report and Order* in PR Docket No. 90-5, we amended our rules to permit alternative multichannel video providers eligible in the Operational-Fixed Microwave Service (OFS) to use the 6 MHz wide, point-to-point frequencies in the 18 GHz band for the distribution of video entertainment material. In so doing, we noted that this action would promote the public interest by responding to the well-documented need for competition in the video distribution marketplace.[6] In addition, as a corollary matter, we amended 47 C.F.R. § 94.15(g) to make the four-channel-per-transmitter-site limitation set forth therein inapplicable when the 18 GHz frequencies are used for the delivery of video entertainment programming. In taking this latter step, we stated that the amendment of Section 94.15(g) is necessary to enable alternative multichannel operators eligible in the OFS to transmit the number of channels necessary to meet subscriber demand and vie with competitors' offerings.[7] Finally, we viewed the *Report and Order* as an excellent opportunity to clarify certain portions of 47 C.F.R. § 94.9, and, accordingly, we restructured this rule part.

3. *UTC Petition.* As indicated, UTC challenges the amendment of Section 94.15(g). UTC's primary argument is that the Commission failed to set forth sufficient reasons justifying the channel capacity made available to entities engaged in the distribution of video entertainment material. In this connection, UTC also argues that the amendment of Section 94.15(g) results in an unacceptable dichotomy by allowing entities engaged in the distribution of video entertainment programming to use an unlimited number of channels while restricting the number of channels available to traditional private microwave users. [8] In addition, UTC maintains that the amendment of Section 94.15(g) is in essence the equivalent of a finding that the distribution of video entertainment material is an inherently more efficient use of spectrum than traditional microwave uses. UTC contends that this implicit finding lacks support in the record. [9]

4. UTC's arguments misinterpret the nature of our action in the *Report and Order.* Our decision therein responded to the well-documented and frequently reiterated request advanced by alternative multichannel video distribution operators for access to microwave spectrum that would permit them to transmit the signals they receive via satellite to various other receiving locations. In support of their request, these operators submitted evidence indicating that the Commission's then existing rules denying them the use of appropriate microwave frequencies required them to construct separate head-end facilities at each location they wished to serve. Financial constraints, zoning restrictions, terrestrial interference, satellite line-of-sight problems and building owner restrictions often precluded the installation of separate

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[1] Report and Order, PR Docket No. 90-5, 6 FCC Rcd 1270 (1991) [hereinafter *Report and Order*].

[2] *See generally* Petition for Reconsideration, PR Docket No. 90-5, filed by UTC on April 10, 1991 [hereinafter *UTC Petition*].

[3] *Id.* at 2.

[4] Petition for Clarification or Reconsideration, PR Docket No. 90-5, filed by Microwave Radio Corporation (April 3, 1991) [hereinafter *MRC Petition*]. On May 20, 1991, the National Association of Broadcasters (NAB) filed Comments in support of MRC's Petition.

[5] *Id.* at 3.

[6] *See Report and Order,* 6 FCC Rcd at 1271.

[7] *Id.* at 1272.

[8] *See UTC Petition* at 2, 3. *See also infra* note 13.

[9] *See UTC Petition* at 4.

head-ends, however, thwarting the growth of alternative providers' operations and decreasing their competitive potential vis-a-vis franchised cable systems. [10]

5. Significantly, prior to our action in the *Report and Order*, we conducted a review of marketplace developments in the video distribution industry which led us to conclude that the public interest would be well served by actions designed to encourage rival operators such as second competitive cable systems, wireless cable/multi-point distribution services, Satellite Master Antenna Television (SMATV) systems, and direct broadcast satellites (DBS) to enter the market and to encourage their competitive potential. [11] Guided by both this determination and alternative providers' documented need for access to appropriate microwave spectrum, we concluded in PR Docket No. 90-5 that alternative multichannel entities eligible in the Operational-Fixed Microwave Service should be permitted to use the 6 MHz wide, point-to-point channels at 18 GHz for the distribution of video entertainment material. We explicitly noted, however, as did several affected entities, that unless the four-channel-per-transmitter-site limitation contained in 47 C.F.R. § 94.15(g) was removed, alternative operators would receive little actual benefit from being provided access to 18 GHz spectrum because they would not be able to transmit a sufficient number of channels. We therefore determined that Section 94.15(g) should be amended to permit eligible entities to use the maximum number of channels available, allowing them to meet subscribers' demands and to compete more effectively with traditional cable systems. [12]

6. As demonstrated by the above, our action in the *Report and Order* amending 47 C.F.R. § 94.15(g) is supported by the record both in terms of the Commission's prior finding concerning the need for improving the competitive potential of alternative multichannel operators and these operators' independent requests for access to microwave spectrum that will facilitate the expansion of their operations. With this in mind, it becomes readily apparent that the retention of the channel limitation for other, more traditional uses does not present an inequitable dichotomy as suggested by UTC, but simply recognizes that these other licensees have not made a similar showing of need or otherwise have not demonstrated that the public interest requires that they be given access to more spectrum.

7. We respond in a similar manner to UTC's contention that the amendment of Section 94.15(g) is tantamount to a finding that the distribution of video entertainment programming is an inherently more efficient use of spectrum than traditional OFS operations--a finding that, UTC argues, is unsupported by the record. [13] Our decision to remove the restriction on the channel capacity available for the distribution of video entertainment material is not, however, the equivalent of a finding that this particular use is inherently spectrum-efficient. Beyond satisfaction of a certain threshold of reasonableness, access to spectrum is not premised solely on efficiency. Rather, the amount of spectrum available for a particular purpose is dependent on the dictates of the public interest and the comparative needs of licensees within that frame of reference.[14] As discussed above, we found in the *Report and Order* both that the public interest required action designed to improve the competitive potential of alternative multichannel distributors and that the removal of the channel limitation was a crucial component of this goal. For these reasons, we conclude that the claims advanced in UTC's Petition for Reconsideration are without merit and the Petition is denied.[15]

8. MRC Petition. Turning to MRC's Petition, we agree that the version of Section 94.9 adopted in PR Docket No. 90-5 should be modified so as to make plain that our policy of permitting television broadcasters to use the 21.8-22.4 and 23.0-23.6 GHz bands for studio-to-transmitter links remains in force.[16] We have, therefore, modified 47 C.F.R. § 94.9(b)(2) by adding a reference to subparagraph (a)(2). [17]

9. Accordingly, IT IS ORDERED that the Petition for Clarification or Reconsideration filed by Microwave Radio Corporation on April 3, 1991 is GRANTED, and that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 94 of the Commission's Rules, 47 C.F.R. Part 94, IS AMENDED as set forth in the Appendix below, effective thirty days after publication in the Federal Register.

10. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Utilities Telecommunications Council on April 10, 1991, is DENIED.

11. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[10] *See Report and Order*, 6 FCC Rcd at 1270.

[11] *See id.* at 1271; *see also Report*, MM Docket No. 89-600, 5 FCC Rcd 4962, 4972 (1990).

[12] *See Report and Order*, 6 FCC Rcd at 1272.

[13] *See UTC Petition* at 4.

[14] *See, e.g.*, Notice of Proposed Rule Making, PR Docket No. 89-552, 4 FCC Rcd 8593, 8595 (1989) (discussion of market forces as determinative of spectrum allocation).

[15] UTC also reiterates two claims which we addressed in the *Report and Order*. First, UTC contends that the removal of the channel limitation is contrary to Commission policies because it is likely to lead to spectrum warehousing. *See UTC Petition* at 7-8. As discussed in the *Report and Order*, however, numerous protections exist in our rules to prevent the hoarding of spectrum, *see, e.g.*, 47 C.F.R. 94.47(b), and there is no reason to believe that entities engaged in the distribution of video entertainment material are somehow more likely to abuse these provisions. *See Report and Order*, 6 FCC Rcd at 1277 n. 46. UTC also expresses concern that the use of 18 GHz frequencies for the distribution of video entertainment programming will adversely affect 12 GHz displacees seeking to relocate in the 18 GHz band. *UTC Petition* at 5-6. As noted in the *Report and Order*, however, the primary alternative source in the 18 GHz band available to 12 GHz displacees was not made available in PR Docket No. 90-5 for video entertainment distribution. *See Report and Order*, 6 FCC Rcd at 1271 and n. 32.

[16] *See* First Report and Order, Docket No. 19671, 86 FCC 2d 299, 309 (1981); *see also* Memorandum Opinion and Order, Docket No. 19671, 99 FCC 2d 715, 728 (1983).

[17] *See* Appendix, *infra*.

APPENDIX

Part 94 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4,303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.9 is amended by revising paragraph (b)(2) to read as follows:

§ 94.9 Permissible communications.

* * * * *

(b) * * *

(2) Transmit program material for use in connection with broadcasting, except as provided in paragraphs (a)(2), (a)(7) and (a)(8) of this section.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH CENTRAL BELL PHONE COMPANY and SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY — File No. ENF-91-08

Application for authority, pursuant to Section 221(a) of the Communications Act, to Merge.

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1991; Released: December 4, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 28, 1991, South Central Bell Telephone Company (SCB) and Southern Bell Telephone and Telegraph Company (SBT) (collectively "Applicants") applied for authority to merge into a single entity.[1] SCB provides telecommunications services to customers in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee. SBT provides telecommunications services to customers in Florida, Georgia, North Carolina, and South Carolina. For the reasons discussed herein, we conclude that the proposed consolidation will benefit their customers and is otherwise in the public interest.[2]

II. BACKGROUND

2. Applicants are telecommunications common carriers fully subject to the Communications Act (the Act) and have operated on a consolidated basis since March 1, 1991. SCB and SBT jointly own BellSouth Services, Inc. (BellSouth Services). BellSouth, the parent corporation, desires to merge these telecommunications operations into a single legal entity.[3] The proposed merger will be accomplished by merging BellSouth Services and SCB into SBT. SBT will be the surviving company as a result of the merger. BellSouth then proposes to change the name of SBT to BellSouth Telecommunications, Inc. (BTI), and to continue its existence as a Georgia corporation.[4] Applicants state that the proposed consolidation will allow the companies to achieve greater operating efficiency and to provide better services to subscribers. No new stock will be issued and there will be no change in the total capitalization of the Applicants. Applicants further state that there will be no adverse effect on service and that services of all the companies should be improved as a result of the proposed consolidation.[5]

III. SUMMARY OF PLEADINGS

3. Comments were timely filed by the Tennessee Public Service Commission (TN PSC), the Alabama Public Service Commission (AL PSC), and Mr. Clifford Eberhardt, Editor of *The Chattanooga News Weekly* of Chattanooga, Tennessee (Eberhardt). The Louisiana Public Service Commission (LA PSC) submitted Comments and a Motion for Leave to File Comments on September 25, 1991. The motion is unopposed.[6]

4. TN PSC does not oppose the proposed merger but asks that action on the merger request be delayed until the Commission has determined "the impact of the reorganization on the cost of regulated telephone service." It also "request[s] clarification of the FCC's interpretation of the affiliate transaction rules"[7] so the Commission and the states will be able to monitor the impact of the corporate restructuring.[8] TN PSC contends that as a prerequisite to approving the merger, the Commission should require BellSouth to show how its Cost Allocation Manual (CAM) will be modified to reflect the proposed reorganization.[9] TN PSC claims that the merger application did not mention BellSouth's intention to realign several unregulated corporations within the regulated phone companies and fears that the changes might have a significant and deleterious effect on the costs of the regulated companies in light of what it characterizes as the potential for the shifting of significant costs from unregulated to regulated operations. TN PSC states, for example, that in 1984, as BellSouth was regionalizing its operation, it moved its yellow pages business from a regulated to an unregulated operation. TN PSC states that it is skeptical about the claimed beneficial effects of further changes in BellSouth's organizational structure.

5. TN PSC also raises several questions and seeks clarification concerning the Commission's application of its Uniform System of Accounts (USOA) and Sections 32.27(d) and 64.901 of the Commission's rules on nonstructural accounting safeguards and affiliate transactions.[10]

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[1] Applicants are wholly-owned by BellSouth Corporation (BellSouth).

[2] A copy of the application was served on the governor and state regulatory commission of each of the states in which the affected physical property of Applicants is situated. By Public Notice released July 18, 1991, 6 FCC Rcd 4405 (1991), the Commission solicited comments on the proposed transaction. Comments were due by August 18, 1991.

[3] SCB and SBT are organized under the laws of Georgia. BellSouth Services, Inc. and BellSouth are Georgia corporations.

[4] Application, Attachment A.

[5] Application at 2-4.

[6] In the interest of a full record, we will grant LA PSC's motion and accept the late-filed comments.

[7] *See* Sections 32.27(d) and 64.901 of the Commission's rules, 47 C.F.R. §§32.27(d) and 64.901.

[8] TN PSC Comments at 1.

[9] *Id.* at 2.

[10] TN-PSC poses six questions in its Comments which have to do with the Commission's affiliate transactions rules.

6. AL PSC concurs in the Comments of TN PSC, and joins in requesting that the Commission clarify certain issues concerning the application of Sections 32.27(d) and 64.901 of the rules. The Commission should determine the level of cost savings that will result from the proposed merger and how those savings will flow back into the regulated companies, according to the AL PSC.[11]

7. The LA PSC requests that the Commission delay any action on the BellSouth merger until the LA PSC is able to complete a formal audit now under way. Without this audit, the LA PSC contends, it cannot approve or disapprove the merger. The LA PSC states that no formal study of the financial consequences of the merger apparently was undertaken by BellSouth, and the state has no basis thus far for accepting the conclusory statements by a BellSouth employee in the state proceeding that the merger will be financially healthy for BellSouth.[12]

8. Eberhardt criticizes BellSouth's performance in hiring and doing business with disadvantaged minorities in the area it serves. Eberhardt claims that BellSouth is favoring white females to the detriment of black males in its minority hiring and contracting. He asks the Commission to investigate if BellSouth is treating blacks in the South fairly. Attached to his Comments is a document given him in a meeting with a BellSouth representative in June of 1991, describing minority employment and minority contracting efforts by the company.[13]

9. Responding to the TN PSC and the AL PSC, BellSouth states that it included in the merger application all the data required under Section 221(a) of the Act.[14] It contends that the realignments referred to by the commenters with regard to its unregulated companies are not part of the proposed merger and are irrelevant to the Commission's concerns. BellSouth states that the activities referred to by TN PSC and AL PSC will not result in a merger of those non-regulated subsidiaries with the regulated phone companies; rather, they will remain separate subsidiaries fully subject to the Commission's affiliate transactions and asset transfer rules. BellSouth maintains that the corporate reorganization described in the application will serve the public interest by improving operating efficiencies and reducing customer confusion.[15] BellSouth states that in any event, it is not shifting unregulated operations to the regulated side. According to BellSouth, transactions between BellSouth Business Systems, Inc. and the regulated companies will continue to comply fully with the Commission's accounting requirements and will be subject to the full panoply of regulatory protections. Moreover, BellSouth contends, the questions raised by the state commissions regarding CAM requirements are inappropriate in the context of this merger proceeding and should be considered in a separate CAM proceeding, if at all. BellSouth emphasizes that it has been complying with the Commission's CAM requirements by filing its quarterly reports and it will continue to do.[16] As for the comments regarding its yellow page operations and affiliate transactions, BellSouth contends that such matters are irrelevant to its proposed merger. According to BellSouth, the proposed merger will not change the relationships that have existed since 1984 among the BellSouth telephone companies and their directory publishing affiliate.[17]

10. In response to the comments filed by the LA PSC, BellSouth does not oppose Commission consideration of LA PSC's late-filed comments, but opposes any delay in the Commission's consideration of the merger application. BellSouth states that LA PSC has failed to identify any basis for withholding Commission action on the merger pending completion of the state audit proceeding. BellSouth notes that at the time it filed its merger application with the Commission, it filed applications contemporaneously with public service commissions in Alabama, Kentucky, Louisiana, Mississippi, and Tennessee. BellSouth states that two of those states (Mississippi and Kentucky) have already approved the merger, one state (Alabama) has reported that its approval is not required, leaving only Louisiana and Tennessee still considering the application.[18]

11. Responding to comments filed by Eberhardt, BellSouth denies that it has acted unreasonably in hiring or procurement. BellSouth states that it is committed to affording maximum opportunity for minorities and women as employees and contractors. BellSouth maintains that the figures in the attachment to Eberhardt's comments demonstrate fairness in employment and procurement.

IV. DISCUSSION

12. Section 221(a) of the Act provides, *inter alia*, that if the Commission finds that a "... proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction

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1. Do Section 32.27(d) and Part 64.901 rules apply to all transactions between the telephone companies and the affiliated parties? If not, what affiliated transactions are covered and which ones are not?

2. Specifically, do Section 32.27(d) and Part 64.901 rules apply to transactions with yellow page operations? If not, why are transactions with yellow pages currently included in the CAM?

3. Is a negotiated contract between affiliated parties an appropriate transfer pricing method?

4. Does "FDC plus subsidy"--which U.S. West proposed in its CAM--follow the affiliate rules? Is it an appropriate transfer pricing method?

5. Does the FCC's silence on a proposed modification of a CAM indicate approval of the modification?

6. Will the FCC enforce Section 32.27(d) and Part 64.901 rules if the impact of the violation is solely on intrastate operations?

TN PSC Comments at 4-5.

[11] AL PSC Comments at 1-3.

[12] LA PSC Comments at 3-4, and Affidavit of Guy L. Cochran at 2-3.

[13] Eberhardt Comments at 1.

[14] 47 U.S.C. § 221 (a).

[15] BellSouth states in its application that BellSouth is undergoing a broad reorganization, only a portion of which is formally before the Commission.

[16] BellSouth Reply Comments at 7, 10.

[17] *Id.* at 9-10.

[18] *Id.* at 2-4.

unlawful shall not apply...." Thus, certification provides immunity against federal statutes such as the antitrust laws which might, in the absence of such certification, hold the acquisition unlawful.[19] Section 221(a) also provides, in pertinent part, that: "Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies."

13. We perceive no anticompetitive or antitrust consequences as the result of the proposed consolidation. The facilities of the Applicants are not parallel or competitive with one another. We note that the transaction is exempt from filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as an "intraperson transaction" within the meaning of the Federal Trade Commission's regulations implementing that statute.[20]

14. The Applicants and BellSouth Services, Inc., all are wholly owned by BellSouth and have been operated on a consolidated basis since March of 1991. Thus the proposed corporate consolidation would give formal structure to operations of BellSouth which have been and currently are transpiring in substantial measure on a *de facto* consolidated basis. As BellSouth points out, the proposed merger will provide a firm basis for financing the continued expansion of telephone service in the areas served, and the merged structure will simplify reporting, accounting, tax and financing transactions.[21] We agree with Applicants that the integration of their companies with the resulting simplification of corporate structure will make for greater efficiency of operation, should result in improved service to subscribers, and is in the public interest.

15. We have reviewed the comments filed by the state public service commissions and conclude that no persuasive showing has been made to warrant further inquiry as proposed by TN PSC and AL PSC, or the delay requested by LA PSC. The comments filed by TN PSC and AL PSC center primarily around their concerns over possible realignments of unregulated activities and the Commission's nonstructural accounting safeguards. We find these concerns to be outside the scope of this merger proceeding. It is clear that BellSouth has been and will continue to report modifications of its CAM in its regular quarterly reports to the Commission. As questions arise which we believe require our deliberation, we can address these issues more appropriately in the context of a CAM proceeding. We note that BellSouth filed a quarterly report with the Commission on September 30, 1991, dealing in part with modifications to its CAM attributable to the proposed merger. This CAM filing is under review by Commission staff.[22]

16. We also are not persuaded by the LA PSC that we should defer our consideration of the BellSouth merger application until the LA PSC has completed its audit. LA PSC has not shown that our action on the proposed merger will impair the state's ability to complete its audit or to assess the proposed merger at the state level in any way.

17. Finally, we are not persuaded by Eberhardt's comments that further inquiry into BellSouth's hiring and contracting practices is appropriate in the context of this proceeding.

V. CONCLUSION

18. The record before us indicates that the proposed merger will benefit the public in the affected exchanges and will otherwise promote the public interest pursuant to the standard set out in 47 U.S.C. §221(a). Therefore, we conclude that the above-captioned application for consent to merge should be granted. The merger authorized herein shall be effected only following receipt by Applicants of all prerequisite approvals pursuant to Section 310(d) of the Act and of state regulatory authorities.

VI. CERTIFICATION AND ORDERING CLAUSES

19. In light of the foregoing and upon consideration of the entire record in this proceeding, IT IS CERTIFIED that the proposed merger of South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company will be advantageous to the persons to whom service is to be rendered and is in the public interest.

20. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 221 of the Communications Act of 1934, as amended, 47 USC §§154(i) and 221, and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the application of South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company for authority pursuant to 47 U.S.C. §221(a) to merge IS GRANTED.

21. IT IS FURTHER ORDERED that the motion for leave to file late comments filed by the Louisiana Public Service Commission IS GRANTED.

22. IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[19] Hughes Industries, Inc., 4 FCC Rcd 7876 (1989); Wisconsin Telephone Co., 27 FCC 1, 18 (1959).
[20] *See* 16 C.F.R. §802.30 at example 1.
[21] Application at 3.
[22] The BellSouth filing of September 30, 1991, was reported in a Commission Public Notice released October 16, 1991 (DA-91-1271). No comments were received by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-282

In the Matter of

Utah Public Safety Plan

ORDER

Adopted: November 27, 1991; Released: December 4, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On June 24, 1991, Region 41 (Utah) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Utah. On September 17, 1991, Utah filed revisions to the plan, based on conversations with the Commission's staff.

2. The Utah plan was placed on Public Notice for comments on September 27, 1991, 56 FR 50333 (October 4, 1991). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Utah and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Utah.

4. Therefore, we accept the Utah Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Utah may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-349

In the Matter of

Amendment of Section 73.202(b), RM-7862
Table of Allotments,
FM Broadcast Stations.
(Hartselle, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 21, 1991; Released: December 4, 1991

Comment Date: January 27, 1992
Reply Comment Date: February 11, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Dorsey Eugene Newman ("petitioner"), permittee of Station WYAM(FM), Channel 291A, Hartselle, Alabama (BPH-890216MA), seeking the substitution of Channel 291C3 for Channel 291A and modification of his construction permit accordingly to specify operation on the higher powered channel. Petitioner stated his intention to apply for Channel 291C3 if it is allotted to Hartselle, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 291C3 for Channel 291A at Hartselle, since it could provide an enhanced service to the community. Channel 291C3 can be allotted to Hartselle at the petitioner's specified site, located 20.9 kilometers (13 miles) east of the community[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. We shall propose to modify the construction permit issued to the petitioner for Station WYAM(FM) at Hartselle, Alabama. Since the modification request complies with the provisions of Section 1.420(g) of the Commission's Rules, we will not entertain competing expressions of interest in the use of Channel 291C3 at Hartselle, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. Accordingly, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Hartselle, Alabama	291A	291C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 27, 1992,** and reply comments on or before **February 11, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John S. Neely, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates for requested Channel 291C3 at Hartselle are 34-27-09 and 86-42-27.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-486

In the Matter of

Amendment of Section 73.202(b),	RM-6913
Table of Allotments,	RM-7253[1]
FM Broadcast Stations.	
(Kaukauna and Cleveland,	
Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1991; Released: December 4, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8002 (1989) (*"Notice"*), issued in response to a petition filed by WinCom Limited Partnership ("WinCom"). WinCom requests the substitution of Channel 276C3 for Channel 285A at Kaukauna, Wisconsin, and modification of the license for Station WKFX(FM) to specify operation on the higher class channel. In addition, to accommodate the upgrade at Kaukauna, WinCom proposes the substitution of Channel 251A for Channel 276A at Cleveland, Wisconsin, and modification of the license for Station WKTT(FM) to specify operation on the new frequency. Jay Lellman ("Lellman") filed comments expressing his intention to file an application for Channel 276C3 at Kaukauna and indicated a willingness to reimburse Station WKTT(FM), Cleveland, for reasonable expenses in changing its frequency if he is the successful applicant at Kaukauna. WinCom filed comments and an unacceptable counterproposal.[2] Sheboygan County Broad-

[1] Ashwaubenon Broadcasting Company ("ABC") filed a counterproposal (RM-7253) that was erroneously placed on public notice on February 6, 1990, Report No. 1807. ABC requested the allotment of Channel 276C3 to Ashwaubenon, Wisconsin, the substitution of Channel 251A for Channel 276A at Cleveland, and the modification of Station WKTT(FM)'s license accordingly.

In determining whether to place this counterproposal on public notice, we incorrectly analyzed the counterproposal for technical acceptability pursuant to the minimum distance spacing requirements that were in effect for petitions filed prior to October 2, 1989. However, we should have analyzed the counterproposal pursuant to the minimum distance spacing requirements that were adopted in MM Docket No. 88-375 and effective as of October 2, 1989, the day before ABC filed its counterproposal. *See* 4 FCC Rcd 6375 (1989); *see also Lancaster, Wisconsin, Clinton & Manchester, Iowa & Morrison, Illinois* (MM Docket No. 89-521), 6 FCC Rcd (adopted October 18, 1991). Under the relevant spacing requirements, Channel 251A at Cleveland is short-spaced to Station WMGN, Channel 251B, Madison, Wisconsin, and to Station WWJR, Channel 249A, Sheboygan, Wisconsin. Therefore, ABC's counterproposal is unacceptable for rule making and will be dismissed. In addition, we will not consider any comments responsive to ABC's counterproposal.

[2] WinCom proposed the allotment of Channel 295C3 to Ashwaubenon in lieu of Channel 276C3. To accommodate Channel 276C3, WinCom proposed to substitute Channel 279A for Channel 296A at Oconto, Wisconsin. In addition, WinCom proposed to substitute Channel 297C3, instead of Channel 279C3 for Channel 280A at Menominee, Michigan, as proposed in MM Docket No. 90-139. WinCom noted that if the Menominee upgrade was not granted in the proceeding, Channel 297A could be substituted for Channel 280A at Menominee in order to accommodate the Ashwaubenon allotment. Further consideration of this aspect of WinCom's counterproposal is unnecessary, as we have dismissed ABC's Ashwaubenon counterproposal.

WinCom also proposed that Channel 272C3 could be allotted to Kaukauna to accommodate any additional expressions of interest for the Kaukauna nonadjacent channel upgrade. To accommodate this channel, WinCom proposed the substitution of Channel 284A for Channel 272A at Berlin, Wisconsin, and the modification of Station WISS-FM's authorization accordingly; and the substitution of Channel 242A for Channel 272A at Manitowoc, Wisconsin, and the modification of Station WQTC-FM's authorization accordingly.

WinCom's Kaukauna counterproposal is not acceptable for rule making. At the time WinCom's counterproposal was filed, the proposed substitution of Channel 242A at Manitowoc was short-spaced to the licensed site for Station WOMA, Channel 243A, Algoma, Wisconsin, to the site specified in the construction permit for Station WLWR, Channel 242A, Brillion, Wisconsin, and to a counterproposal to substitute Channel 241C3 for Channel 244A at Oshkosh, Wisconsin, in MM Docket No. 89-282. *See* 4 FCC Rcd 4970 (1989). Although counterproposals filed in MM Docket No. 89-282 proposed channel substitutions at Algoma and Brillion that would remove the mutual exclusivity between those channels and WinCom's Manitowoc proposal, final action had not taken place in MM Docket No. 89-282. The acceptability of WinCom's counterproposal, therefore, was dependent upon final favorable action in MM Docket No. 89-282. Furthermore, the Manitowoc substitution was short spaced to a timely filed counterproposal in MM Docket 89-282 to substitute Channel 241C3 for Channel 244A at Oshkosh, Wisconsin. The comment period for filing counterproposals in MM Docket No. 89-282 expired on August 10, 1989, and WinCom's counterproposal was filed on January 2, 1990. WinCom's counterproposal is untimely for consideration in that proceeding and, therefore, is unacceptable for rule making.

We note that channel substitutions at Algoma, Brillion and Oshkosh were ultimately made in MM Docket No. 89-282 that remove the conflicts with WinCom's counterproposal. *See Report and Order*, 6 FCC Rcd 2624 (1991). However, since WinCom's counterproposal was unacceptable *when initially filed,*

casting Co., Inc. ("Sheboygan County") filed comments. WKTT, Inc. ("WKTT") filed an unacceptable counterproposal.[3] Reply comments were filed by Sheboygan County, WinCom and WKTT. Kingsley H. Murphy, licensee of Station WISS-FM, Berlin, Wisconsin, filed a request for extension of time to file reply comments.[4]

2. WinCom filed comments reaffirming its interest in the substitution of Channel 276C3 for Channel 285A at Kaukauna, and states that it will promptly apply for and construct such facilities. WinCom acknowledged its responsibility to reimburse Station WKTT(FM) for its reasonable costs in changing frequencies.

3. Sheboygan County, licensee of Stations WHBL(AM) and WWJR(FM), Sheboygan, Wisconsin, opposes the substitution at Kaukauna. Sheboygan County states that it has filed an application to increase the power of Station WWJR(FM) from 3 kilowatts to 6 kilowatts. This will increase Station WWJR(FM)'s land coverage area by approximately thirty-eight percent, and population coverage area by approximately 11,215 additional people. According to Sheboygan County, the proposed modification of Station WKTT(FM), Cleveland, would prevent Sheboygan County from implementing its proposed power increase. In reply comments, Sheboygan County continues to argue that WinCom's proposed Kaukauna upgrade is defective because it is short spaced to WWJR(FM) and should be dismissed.

4. WinCom responded to Sheboygan County by arguing that the proposed upgrade of Station WKFX(FM), Kaukauna, will be of greater benefit to the public than the proposed power increase of Station WWJR(FM), Sheboygan. WinCom states that its petition involving Kaukauna and Cleveland, Wisconsin, was filed June 1, 1989, well before the October 2, 1989, effective date of the six kilowatt rule adopted in MM Docket No. 88-375. WinCom contends that Sheboygan County now has the option of limiting the direction or strength of its increased signal or relocating its transmitter to a site that meets the Commission's six kilowatt spacing requirements.

5. We have reviewed the pleadings before us and find that the public interest would be served by the allotment of Channel 276C3 to Kaukauna, Wisconsin, as that community's first wide coverage area FM service. Although WinCom requested the substitution of Channel 276C3 for Channel 285A and modification of its license for Station WKFX(FM), the *Notice* indicated that the proposed modification could not be implemented if another party expressed interest in the channel, unless an additional equivalent channel could be made available in accordance with Section 1.420(g) of the Rules. Jay Lellman indicated his intention to file an application for Channel 276C3 at Kaukauna, and a Commission engineering analysis indicates no other class C3 channels are available for Kaukauna. Therefore, WKFX(FM)'s license cannot be modified as requested and Channel 276C3 will be allotted to Kaukauna as a second FM broadcast service.

6. Channel 276C3 can be allotted to Kaukauna in compliance with the Commission's spacing requirements 20.9 kilometers (13 miles) northeast of the community.[5] The site restriction will prevent a short spacing to Station WLZR-FM, Channel 275B, Milwaukee, Wisconsin and Station WWRW, Channel 277C1, Wisconsin Rapids, Wisconsin. To accommodate Channel 276C3 at Kaukauna, we shall substitute Channel 251A for Channel 276A at Cleveland, Wisconsin, and modify the license for Station WKTT(FM) at Cleveland to specify operation on the new frequency in compliance with the Commission's Rules. In response to the *Notice*, WKTT has stated it has no objection to the proposed modification of its license to specify operation on Channel 251A, provided that it is reimbursed for expenses involved in changing to a new frequency. Channel 251A can be allotted to Cleveland at the current site of Station WKTT(FM).[6] Our engineering analysis indicates that the application for Channel 249A at Sheboygan is fully spaced to Channel 251A at Cleveland, as the channel at Cleveland will be allotted pursuant to the minimum distance separation requirements in effect prior to October 2, 1989.

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it cannot now be considered in the context of this proceeding. *See Report and Order (Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas)*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989).

Furthermore, WinCom's proposed Kaukauna channel allotments would require three substitutions of existing channels. The Commission will not entertain proposals which involve more than two substitutions of channels occupied by existing stations unless the petitioner demonstrates that special factors involving significant public interest benefits are present or that an assurance of agreement among the affected stations to the proposal are reached in advance of the filing of the petition. *See Columbus, Nebraska*, 51 Fed. Reg. 4926, February 10, 1986.

[3] WKTT, Inc., licensee of FM broadcast Station WKTT, Channel 276A, Cleveland, Wisconsin, filed a counterproposal requesting a change of community of license from Cleveland to Ashwaubenon and the upgrade of its channel from 276A to Channel 276C3. WKTT further proposes the allotment of Channel 251A to Cleveland so there would be no loss of service to Cleveland. This proposal to change the community of license is unacceptable because it would deprive Cleveland of an existing service representing that community's only local broadcast service. The replacement of an operating station with a vacant allotment does not adequately cure the disruption to existing service occasioned by removal of an operating station. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990). In addition, the counterproposal is technically defective because, pursuant to the minimum distance separation requirements that became effective October 2, 1989, Channel 251A at Cleveland is short-spaced to Channel 251B, Station WMGN, Madison, Wisconsin, and to Channel 249A, Station WWJR, Sheboygan, Wisconsin. *See* n.1, *supra*.

[4] This request is moot, as the Berlin substitution will not be considered. *See* n.2, *supra*.

[5] The coordinates for Channel 276C3 at Kaukauna are 44-21-00 and 88-02-00.

[6] The coordinates for Channel 251A at Cleveland are 43-59-11 and 87-45-53. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee of Station WKTT(FM) may avail itself of the provisions of Section 73.213(c) with respect to Station WMGN-FM, Channel 251B, Madison, Wisconsin and to Station WWJR, Channel 249A, Sheboygan, Wisconsin.

7. Commission policy requires that Station WKTT(FM), Cleveland, be reimbursed for the reasonable costs in changing its frequency. Therefore, the ultimate permittee or licensee for Channel 276C3 at Kaukauna will be required to reimburse Station WKTT(FM) for its costs incurred in changing frequencies.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Cleveland, Wisconsin	251A
Kaukauna, Wisconsin	276C3, 285A

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316A of the Communications Act of 1934, as amended, that the license of Station WKTT(FM), Cleveland, Wisconsin, IS MODIFIED, to specify operation on Channel 251A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-850508KF except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-850508KF, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the Secretary SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

WKTT, Inc.

1 Washington Square

Cleveland, Wisconsin 53015

11. IT IS FURTHER ORDERED, That the counterproposal filed by Ashwaubenon Broadcasting Company, IS DISMISSED.

12. The filing window for Channel 276C3, Kaukauna, will open on **January 22, 1992,** and close on **February 21, 1992.**

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-513

In the Matter of

Amendment of Section 73.202(b),	RM-6897
Table of Allotments,	RM-7270
FM Broadcast Stations.	
(Dublin, Georgia; Abbeville & Laurens, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1991; Released: December 4, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8176 (1989), issued at the request of State Broadcasting Company, Inc. ("petitioner"), permittee of Station WQZY(FM), Channel 240C2, Dublin, Georgia, requesting the substitution of Channel 240C1 for Channel 240C2 at Dublin and modification of its station authorization to specify operation on the higher powered channel.[2] Petitioner filed supporting comments reaffirming its intention to apply for the channel. A second petition, filed on behalf of Southeastern Broadcast Associates, Inc. ("Southeastern") and Shelley Reid ("Reid") was accepted by the Commission for consideration as a counterproposal.[3] The petition requests the allotment of Channel 225A to Laurens, South Carolina, as a first local service, for which Southeastern has expressed an interest. To accommodate this allotment, the petition also proposes the substitution of Channel 240A for Channel 225A at Abbeville, South Carolina, and the modification of Reid's license for Station WZLA(FM), Abbeville, to specify operation on Channel 240A. Southeastern filed supporting comments restating its intention to apply for Channel 225A at Laurens, South Carolina, and set forth its opposition to petitioner's request for the upgrade of Channel 240C2 at Dublin. Petitioner filed untimely reply comments and a motion to accept late filed comments.[4]

2. After the close of the comment period, petitioner, Southeastern, and Reid filed a joint petition requesting approval of a settlement agreement. Pursuant to that agreement, Southeastern and Reid are withdrawing their petition to substitute Channel 240A for Channel 225A at Abbeville, South Carolina, and to allot Channel 225A at Laurens, South Carolina. In accordance with Section 1.420(j) of the Commission's Rules, both Southeastern and Reid state that they will not receive compensation in excess of their legitimate and prudent expenses incurred in exchange for their withdrawal and submitted an itemized statement of actual expenses incurred in filing their petition. Petitioner also states that it has not and will not pay in excess of the actual, legitimate, and prudent expenses of Southeastern and Reid.

3. Since the parties have demonstrated compliance with the Commission's Rules governing the payment of consideration in exchange for the dismissal of allotment proposals, we believe that the public interest would be served by approving the settlement agreement because this will eliminate the need to consider the proposals on a comparative basis and will improve the coverage area of Station WQZY(FM). As a result, we will substitute Channel 240C1 for Channel 240C2 at Dublin, Georgia, and modify the construction permit for Station WQZY(FM) to specify operation on Channel 240C1.

4. As indicated in the *Notice*, Channel 240C1 can be allotted to Dublin at the petitioner's specified site[5] with a site restriction of 37.2 kilometers (23.1 miles) east of the community, in compliance with the minimum distance separation requirements of the Commission's Rules.[6] Because this petition was filed prior to October 2, 1989, Station WQZY can avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WDAX, Channel 237A, Mcrae, Georgia.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, we will grant the joint petition for settlement between State Broadcasting Company, Inc. and Southeastern Broadcast Associates, Inc. and Shelley Reid, and IT IS ORDERED, That effective **January 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Dublin, Georgia	224C2, 240C1

[1] The communities of Abbeville and Laurens, South Carolina, were added by Public Notice, Report No. 1807, February 6, 1990.

[2] By *Report and Order* in MM Docket No. 88-76, 4 FCC Rcd 3594 (1989), we substituted Channel 240C2 for Channel 240A at Dublin, Georgia and modified the license of Station WQZY(FM) to specify operation on Channel 240C2. Station WQZY was subsequently granted a construction permit (BPH-910815JD) for Channel 240C2.

[3] Public Notice, Report No. 1807, February 6, 1990.

[4] Petitioner claims it missed the filing deadline for reply comments by oversight of the docket number given in the public notice. Southeastern filed an opposition to petitioner's motion. The Commission does not favor late filed comments. *See* Section 1.415 of the Commission's Rules. In any event, the filing of a settlement agreement described *infra* obviates the need to consider petitioner's reply comments.

[5] Coordinates at petitioner's specified site are North Latitude 32-39-51 and West Longitude 82-32-18.

[6] We recognize that the allotment of Channel 240C1 at Dublin conflicts with the presently licensed operation of Station WKXH(FM), Channel 240A, Alma, Georgia. However, Station WKXH was ordered to move to Channel 282A in MM Docket 88-76, 4 FCC Rcd 3594 (1989), and has filed an application for modification of its license for Channel 282A, Alma, Georgia (BMLH910201KC). A copy of this *Order* will be served on Station WKXH(FM).

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WQZY(FM) IS MODIFIED to specify operation on Channel 240C1 in lieu of Channel 240C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Southeastern Broadcast Associates, Inc. and Shelley Reid (RM-7270) is DISMISSED.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WKXH(FM) as follows: Queen City Broadcasting, Inc., P.O. Box 1987, Alma, Georgia, and to Dennis F. Begley, Esq., Reddy, Begley, Martin, 2033 M Street, N.W., Washington, DC 20036 (counsel to Queen City Broadcasting, Inc.).

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-497

In the Matter of

Amendment of Section 73.202(b),	RM-6877
Table of Allotments,	RM-7269
FM Broadcast Stations.	
(Apalachicola and Carrabelle, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1991; Released: December 4, 1991

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Richard L. Plessinger, Sr. ("Plessinger"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8119 (1989), proposing the substitution of Channel 293C1 for Channel 265A at Apalachicola, Florida and modification of his license for Station WOYS(FM) to specify operation on non-adjacent Channel 293C1. Plessinger filed comments restating his intention to apply for Channel 293C1 if allotted to Apalachicola, and reply comments. B.F.J. Timm ("Timm"), permittee of Station WAPY(FM), Channel 288A, Apalachicola, Florida, filed an expression of interest in Channel 293C1.[2] Allen Audio ("Allen") filed a counterproposal requesting the allotment of Channel 293C1 to Carrabelle, Florida, as that community's first local FM service. [3] In response to the counterproposal, Allen and Plessinger filed reply comments.

2. In its counterproposal Allen requested the allotment of Channel 293C1 to Carrabelle, Florida, as that community's first local service, rather than the substitution of Channel 293C1 for Channel 265A at Apalachicola. Allen states that Carrabelle is an incorporated community with a population of 1,304 [4] and currently has no local radio station, whereas Apalachicola receives local transmission service from Station WOYS(FM) and Station WAPY(FM). Allen argues that its proposal to allot Channel 293C1 to Carrabelle as a first local service should be given preference under priority 3 of the allotment priorities adopted in *Revision of FM Assignment Policies and Procedures* (*"FM Assignment Policies"*), 90 FCC 2d 88 (1982).[5]

3. In reply comments Plessinger argues that the allotment of Channel 293C1 to Apalachicola should be preferred over the allotment of the channel to Carrabelle.[6] Plessinger states that the applicable reference point for Carrabelle is 14.17 kilometers from the antenna location for Station WOYS(FM), which is also the reference point for proposed Channel 293C1 at Apalachicola. Therefore, Plessinger argues, Carrabelle lies within the city grade contour of the proposed use of Channel 293C1 at Apalachicola, and Carrabelle would receive its "first full-time aural service," which is afforded the highest priority under the Commission's allotment criteria, from the Apalachicola station. Plessinger also contends that its proposal should be credited with providing "second full-time aural service" for Apalachicola, and possibly a first local service, since Station WAPY(FM), the other FM channel authorized at Apalachicola, has not yet begun operation. Therefore, Plessinger states that its proposal should be given equal weight with Allen's proposal for first local service for Carrabelle. Finally, Plessinger notes that Apalachicola has a population of 2,565, nearly twice the size of Carrabelle.

4. In reply comments, Allen states that Plessinger's Station WOYS(FM) is currently in operation at Apalachicola and Station WAPY(FM) has been authorized for Apalachicola. Allen notes that if Plessinger's upgrade proposal is denied, Station WOYS(FM) would continue to operate on Channel 265A. Therefore, Allen argues, Plessinger's claim of providing first local service is without merit. Allen agrees with Plessinger that under the allotment criteria, *supra*, his proposal to allot Channel 293C1 to Apalachicola may provide "first full-time aural service" to portions of Apalachicola. Allen contends, however, that the allotment of Channel 293C1 to Carrabelle would provide a first full-time aural service to the same

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[1] The community of Carrabelle has been added to the caption.

[2] Timm filed a counterproposal to modify the construction permit for Station WAPY(FM) to specify operation on Channel 288C2 at Apalachicola in MM Docket No. 89-422 (RM-7039). Timm states that he will withdraw his expression of interest in the channel if he receives a co-channel upgrade in that proceeding.

[3] Public Notice of Allen's counterproposal was given on February 6, 1990, Report No. 1807, RM-7269.

[4] Population figures are taken from the 1980 U.S. Census.

[5] The allotment priorities are (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local aural service; (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)].

[6] Plessinger raises several procedural challenges to Allen's counterproposal. First, he argues that Allen makes no showing that it is an "interested party" pursuant to paragraph 5 of the *Notice*. Second, he argues that the proponent of a counterproposal "should be required to make at least a minimal showing that it is a qualified, *bona fide* party who ostensibly could implement the requested [allotment], if made," and argues that Allen has failed to do so. We disagree with each contention. First, Allen is an interested part in this proceeding in that it has filed a counterproposal that suggests a mutually exclusive use for the channel proposed for Apalachicola. Second, Allen has stated in its counterproposal its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. This is sufficient for acceptance of the counterproposal. Plessinger has offered no evidence as to why we should question Allen's representation.

Plessinger also argues that Allen's counterproposal does not constitute a competing expression of interest in Channel 293C1 at Apalachicola. While this is correct, we note that since Allen's counterproposal and Plessinger's proposal are mutually exclusive, they must be comparatively considered.

area and also provide a first local FM service at Carrabelle. Allen argues that under the Commission's allotment criteria, the Carrabelle proposal must therefore be preferred.

5. As an initial matter, we believe it useful to clarify some points raised in the comments in this proceeding. As stated in note 5, *supra*, the first allotment priority is provision of a first full-time aural service. This refers to *reception* service, not to *transmission* service. Allotment priority three, first local service, refers to provision of a community's first *transmission* service. In this proceeding, neither party has presented any support for contentions that either proposal would result in the provision of a first (or second) reception service to any area within the proposed service contours of either allotment. On the other hand, it is undisputed that the Carrabelle counterproposal would provide a first local transmission service to the community, as that community has no authorized or allotted facilities. The Apalachicola proposal would provide an upgraded service to an existing facility in the community. Service upgrades are considered under priority four, other public interest matters. *See FM Assignment Policies, supra.* The presence (or absence) of other facilities in Apalachicola is immaterial in this instance.

6. In an attempt to resolve the technical conflicts between Allen's proposal for a new allotment at Carrabelle and Plessinger's proposal to upgrade service at Apalachicola, the staff performed an engineering analysis to determine if alternate channels were available. Our analysis shows that there is no alternate channel available for either community. Therefore, we must comparatively consider these proposals. Under the Commission's FM allotment priorities, a first local transmission service is generally preferred over a proposal to upgrade an existing facility. *See FM Assingment Policies, supra; see also Benton, Arkansas,* 3 FCC Rcd 4840 (1988), *recon. pend.* If the proponent for a channel upgrade is in conflict with a proposal for a new allotment, the upgrade proponent may demonstrate that its proposal should be preferred by providing a showing of need for the proposed increase in existing service. This could take the form of a comparison indicating which new areas are to be covered and the extent to which these areas are currently unserved or underserved. In the absence of such a showing of need for the proposed increase in service, a conflicting new allotment would be favored since it represents a new service. *See Benton, Arkansas, supra.* Plessinger has not made such a showing. Therefore, we find that the provision of a new first local service at Carrabelle must be preferred over the proposal to upgrade existing service in Apalachicola.

7. In consideration of the above, we believe the public interest would be served by the allotment of Channel 293C1 to Carrabelle, Florida. Channel 293C1 can be allotted to Carrabelle in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.5 kilometers (7.8 miles) west of the community,[7] in order to avoid a construction permit for Station WKMX(FM), Channel 294C, Enterprise, Alabama.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Carrabelle, Florida	293C1

9. The window period for filing applications will open on **January 22, 1992,** and close on **February 21, 1992.**

10. IT IS FURTHER ORDERED, That the petition for rule making filed by Richard L. Plessinger (RM-6877), IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] The coordinates for Channel 293C1 at Carrabelle are North Latitude 29-49-30 and West Longitude 84-47-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 20, 1991

FEDERAL-STATE JOINT CONFERENCE ON OPEN NETWORK ARCHITECTURE RELEASES STAFF REPORT ON UNIFORMITY

At its meeting on November 12, 1991 in San Antonio, Texas, the Federal-State Joint Conference on Open Network Architecture (ONA) released a staff report on uniform tariffing guidelines for ONA services.

The staff report concludes that uniform tariffing guidelines could serve the public interest by facilitating implementation of ONA in those jurisdictions that voluntarily choose to follow them, and by bringing to the public at both the national and local level the benefits of greater availability of enhanced services. The staff report also states that guidelines should be crafted that assure the benefits of uniformity and at the same time are flexible enough to recognize non-ONA-related regulatory objectives. The staff report recommends that the Joint Conference develop uniform tariff guidelines in the areas of tariff structure, terms and conditions, and cost methodology. It recommends that the Joint Conference not pursue guidelines in the areas of rate structure and prices at this time.

The Joint Conference will consider whether to adopt the recommendations of the staff during the NARUC winter meetings in Washington, D.C. at the beginning of March 1992.

The Joint Conference was established by the Commission in 1988 to serve as a forum for coordination and cooperation among the states, and between the Commission and the states, to encourage the successful development and implementation of ONA.

The staff report is available for inspection and photoduplication, as will be comments and reply comments, in Room 544, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554. Copies may additionally be obtained from Tom McCabe, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Tallahassee, Florida 32399-0850 and the Downtown Copy Center, the Commission's contractor for public records duplication, 1114 21st Street, N.W., Washington, D.C. 20037, (202) 452-1422.

Interested parties may file comments on the staff report on **December 20, 1991,** and reply comments on **January 20, 1992,** with Donna R. Searcy, Secretary, Federal Communications Commission, Washington, D.C. 20554 (5 copies). A copy of comments and reply comments should additionally be sent to Peggy Reitzel, Policy and Program Planning Division, Federal Communications Commission, Rm 544, 1919 M. Street. N.W., Washington, D.C. 20554 (2 copies), the Downtown Copy Center, and to each of the following persons:

Hon. Dean J. Miller
Idaho Public Utilities Commission
Statehouse
Boise, Idaho 83720

Sam Loudenslager
Arkansas Public Service Commission
1000 Center Building
Post Office Box C-400
Little Rock, Arkansas 72203

Scott R. Girard
Oregon Public Utility Commission
351 West Summer Street N.E.
Salem, Oregon 97310-0335

Hon. Nancy M. Norling
Delaware Public Service Commission
1560 South DuPont Highway
Post Office Box 457
Dover, Delaware 19903-0457

Hon. Thomas M. Beard
Tom McCabe
Bill Gibson
Florida Public Service Commission
101 East Gaines Street
Fletcher Building
Tallahassee,
Florida 32399-0850

Hon. Kenneth Gordon
Joel Shifman
242 State Street
State House
Station 18
Augusta, Maine 04333

Hon. Dennis Nagel
Mark Jamison
Iowa Utilities Board
Lucas State Office Building
Des Moines, Iowa 50319

Hon. Lilo K. Schifter
Ann Dean
Maryland Public Service Commission
American Building
231 East Baltimore Street
Baltimore, Maryland
21202-3486

Hon. Kenneth C. McClure
Paul Pederson
Missouri Public Service Commission
Post Office Box 1216
Jefferson City, Missouri 65102

David Walker
Wyoming Public Service Commission
700 West 21st Street
Cheyenne, Wyoming 82002

Hon. Norman Shumway
Ellen Levine
Elissa Benson
Ernie Ting
California Public Utilities Commission
California State Building
505 Van Ness Avenue
San Francisco,
California 94102-3298

Hon. Calvin Manshio
Calvin Monson
Illinois Commerce Commission
Leland Building
527 East Capitol Avenue
Post Office Box 19280
Springfield,
Illinois 62794-9280

Mahasti Pourdastan
Mike Gallagher
New Jersey Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Hon. Jolynn Barry Butler
Kurt Wesolek
Ohio Public Utilities Commission
180 East Broad Street
Columbus, Ohio 43266-0573

Hon. Marta Greytock
Lori Morisson
Texas Public Utility Commission
7800 Shoal Creek Boulevard Suite 400N
Austin, Texas 78757

Hon. Stephen Hewlett
Joe Werner
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee
37243-0505

Joe Gattuso
NTIA
United States
Department of Commerce
Main Building
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Washington, D.C. 20230

Ron Choura
Michigan Public
Service Commission
Mercantile Building
6545 Mercantile Way
Post Office Box 30221
Lansing, Michigan 48909

Hon. Gail Garfield Schwartz
Jeff Hoagg
New York Public
Service Commission
Empire State Plaza
Albany, New York 12223

Nelson Updaw
Minnesota Public
Utilities Commission
780 American
Center Building
150 East Kellog Boulevard
St. Paul, Minnesota 55101

David Kriete
Pennsylvania Public
Utility Commission
Post Office Box 3265
Harrisburg,
Pennsylvania 17120

Bob Loube
District of Columbia
Public Service
Commission
450 Fifth Street, N.W.
Washington, D.C. 20001

Mary Newmeyer
Alabama Public
Service Commission
Post Office Box 991
Montgomery, Alabama 36101

Karen Matson
Kansas Corporation
Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027

For further information contact Paul Pederson, Missouri Public Service Commission, (314) 751-7427; Patrick Donovan, Federal Communications Commission, (202) 632-4047, or Tom McCabe, Florida Public Service Commission, (904) 488-1280.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company
Facilities

ORDER

Adopted: November 21, 1991; Released: November 22, 1991

Reply Comment Date: December 10, 1991

By the Chief, Common Carrier Bureau:

1. Williams Telecommunications Group, Inc. ("WilTel") has requested that the date for filing reply comments concerning the distance sensitivity of special access rates in this proceeding,[1] be extended from November 26, 1991 to December 23, 1991.[2] WilTel asserts that an extension is in the public interest because it will allow interested parties an opportunity to review comments on distance sensitivity submitted in the *Transport* proceeding before filing their replies addressing similar issues in the context of this proceeding.[3] In this regard, Wiltel argues that the initial comments in the *Transport* proceeding will contain information relevant to distance sensitivity issues in this proceeding. WilTel also argues that an extension of time is warranted in light of the multiple late November filing deadlines in important Commission proceedings that affect interexchange carriers.[4] WilTel asserts that complying with these deadlines is currently straining its resources, and presumably those of other carriers as well. WilTel argues that an extension will permit parties to file more helpful comments.

2. While we do not routinely grant extensions of time,[5] we believe that Wiltel has shown good cause for a limited extension in light of the extraordinary number of filings due in late November in major proceedings potentially affecting the interests of interexchange carriers. We believe, however, that grant of the full extension sought is not necessary. Instead, we conclude that a two week extension of time to file reply comments concerning the distance sensitivity of special access will be sufficient.

3. Accordingly, IT IS ORDERED, that the request for extension of time IS GRANTED to the extent described herein. Interested parties ARE TO FILE reply comments concerning the distance sensitivity of special access on or before December 10, 1991.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] On October 4, 1991, the Commission issued a Supplemental Notice in this proceeding seeking comment on the distance sensitivity of special access rates. The Commission established November 5, 1991 as the filing date for comments on this issue and November 26, 1991 for replies. Supplemental Notice of Proposed Rulemaking, CC Docket No. 91-141, FCC No. 91-309, 56 F.R. 52496 (released Oct. 4, 1991).

[2] Motion for Modification of Schedule by the Williams Telecommunications Group, Inc., filed on November 12, 1991.

[3] *See* Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991) (*Transport Notice*); Order, CC Docket No. 91-213, 56 F.R. 57301 (Nov. 8, 1991), DA 91-1330 (released Oct. 25, 1991) (modifying comment schedule). Comments in response to the *Transport Notice* are due November 22, 1991.

[4] WilTel cites the following filing dates in support of this assertion: November 20 -- comments in the *800 Data Base* rulemaking; November 21 -- comments on AT&T's direct case on Tariff 15; November 22 -- comments on billed party preference and comments in the *Transport Rate Structure* proceeding; November 25 -- reconsideration petitions in the *Interexchange Competition* proceeding; and November 26 -- pleadings on the first ONA tariffs as well as the replies on distance sensitivity in this proceeding.

[5] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[6] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3619
Tariff F.C.C. Nos. 2 and 9

ORDER

Adopted: November 22, 1991; Released: November 25, 1991

By the Chief, Common Carrier Bureau:

1. On November 12, 1991, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 26, 1991 on 14 days' notice. This filing expands the availability of access to AT&T Megacom 800 Service from Canada and establishes rates and regulations for calls from locations in the United States, Puerto Rico, and the U.S. Virgin Islands to stations in Canada.

2. On November 18, 1991, Telecom Canada filed a petition to suspend and investigate Transmittal No. 3619.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3619 and Telecom Canada's petition. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2 and 9, Transmittal No. 3619, filed by Telecom Canada, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Non-substantive Revisions of
Part 0, Part 1, Part 80,
and Part 87 of the
Commission's Rules,
Governing Applications,
and Filing Procedures.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Andrew S. Fishel
Managing Director

ORDER

Adopted: November 22, 1991; Released: December 6, 1991

By the Chief, Private Radio Bureau, and the Managing Director:

1. On April 20, 1990, the Commission released a *Memorandum Opinion and Order*, 5 FCC Rcd 3558 (1990), amending the Commission's Rules to implement a fee collection program mandated by Congress in the Omnibus Budget Reconciliation Act of 1989. [1] Fees are now sent, along with the application, to a designated depository. To accommodate the new fee collection process, the Commission has had to modify applications and certain procedures, such as those for waivers and exemptions. This Order makes non-substantive amendments to Sections 0.401(a)(3)(i), 0.481, 0.482, 0.491, 1.912(a), 1.912(b)(1), 1.912(b)(3), 1.912(d), 1.912(e), 1.922, 1.926(a)(2), 1.931(a), 1.962(g), 1.1102, 80.19, 80.59, 87.21, and 87.25 of the Commission's Rules, 47 C.F.R. §§ 0.401(a)(3)(i), 0.481., 0.482, 0.491, 1.912(a), 1.912(b)(1), 1.912(b)(3), 1.912(d), 1.912(e), 1.922, 1.926(a)(2), 1.931(a), 1.962(g), 1.1102, 80.19, 80.59, 87.21, and 87.25, to reflect the changes made in the Private Radio Bureau's application procedures.

2. Accordingly, IT IS ORDERED that, pursuant to the authority delegated under Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), and Sections 0.231(d) and 0.331(a)(1) of the Commission's Rules, 47 C.F.R. §§ 0.231(d), 0.331(a)(1), Parts 0, 1, 80 and 87 of the Commission's Rules are amended as set forth in the attached appendix.

3. IT IS FURTHER ORDERED that, as nonsubstantive rule changes, not subject to the effective date provisions in the Administrative Procedure Act, these amendments are effective upon publication in the Federal Register. *See* Section 553(b)(3)(A) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A).

[1] Public Law No. 101-239, 103 Stat. 2106 (1989).

APPENDIX

Parts 0, 1, 80 and 87 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 0 - Commission Organization, Subpart C - General Information

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.401 is amended by revising paragraph (a)(3)(i) to read as follows:

§ 0.401 Location of Commission offices.

* * * * *

(a) * * *

(3) * * *

(i) The mailing address of the Private Radio Bureau Licensing Division is: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

* * * * *

3. Section 0.481 is revised to read as follows:

§ 0.481 Place of filing applications for radio authorizations.

For locations for filing applications, and appropriate fees, see § 1.1102 - 1.1105.

4. Section 0.482 is amended by revising the second sentence to read as follows:

§ 0.482 Application for waiver of private radio rules.

* * * Waiver requests that do not require a fee should be addressed to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245. * * *

5. Section 0.491 is revised to read as follows:

§ 0.491 Applications for exemption from compulsory ship radio requirements.

Applications for exemption filed under the provisions of Section 352(b) or 383 of the Communications Act; Regulation 4, Chapter I of the Safety Convention; Regulation 5, Chapter IV of the Safety Convention; or Article IX of the Great Lakes Agreement, must be filed at Exemption Requests, P.O. Box 358300, Pittsburgh, Pennsylvania 15251-5300. Emergency requests must be filed at the Federal Communications Commission, Office of the Secretary, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

B. **Part 1 - Practice and Procedure, Subpart F - Private Radio Services Applications and Proceedings**

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.912 is amended by revising the third sentence in paragraph (a), revising the last sentence in paragraph (b)(1), revising paragraphs (b)(3), (d) and the first sentence in paragraph (e) to read as follows:

§ 1.912 Where applications are to be filed.

(a) * * * All other applications for amateur radio licenses must be submitted to the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.
* * *

(b) * * *

(1) * * * After appropriate frequency coordination, such applications must be forwarded to the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

(2) * * *

(3) All applications for private land mobile licenses that do not require either frequency coordination or a fee must be sent to Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

* * * * *

(d) Formal applications for ship station licenses (FCC Forms 506 and 405-B), for aircraft station licenses (FCC Forms 404 and 405-B), and applications for Maritime Coast and Aviation Ground Stations, requiring fees as set forth in Part 1, Subpart G of this chapter must be filed in accordance with § 1.1102 of the rules.

(e) All other applications that do not require fees must be filed with the Commission's offices in Gettysburg, Pennsylvania. Address the applications to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

3. The table in Section 1.922 is amended by removing reference to FCC Form 405-A, Application for Renewal of Radio Station License (Short Form), and adding FCC Form 452-R, Application for Renewal of Coast and Ground Services, to read as follows:

§ 1.922 Forms to be used.

FCC Form	Title
	* * * * *
452-R	Application for Renewal of Coast and Ground Services.
	* * * * *

4. Section 1.926(a)(2) is amended by removing reference to FCC Form 405-A, and adding FCC Form 452-R, to read as follows:

§ 1.926 Application for renewal of license.

(a) * * *

(2) Renewal of marine coast station authorizations (§ 80.19 of this chapter) and aviation ground station authorizations (§ 87.33 of this chapter) must be submitted on FCC Form 452-R.

5. Section 1.931 is amended by revising the second sentence of paragraph (a) to read as follows:

§ 1.931 Requests for waiver of private radio rules.

(a) * * * Waiver requests that do not require a fee must be addressed to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

* * * * *

6. Section 1.962(g) is amended by revising the second sentence of paragraph (g) to read as follows:

§ 1.962 Public notice of acceptance for filing; petitions to deny applications of specified categories.

* * * * *

(g) * * * Such petitions must be filed with the Commission's offices in Gettysburg, Pennsylvania. Address them to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245.

* * * * *

7. Section 1.1102 is amended by replacing "FCC 405-A" with "FCC 452-R" in paragraphs (1)(c) and (4)(c) to read as follows:

§ 1.1102 Schedule of charges for private radio service.

Action	FCC form No.	Fee amount	Fee type code	Address
1. Marine Coast Stations				
a. * * *				
c. * * *	FCC 452-R * * *	* * *	* * *	* * *

* * * * *

4. Aviation (Ground Stations)				
a. * * *				
c. * * *	FCC 452-R * * *	* * *	* * *	* * *

* * * * *

C. Part 80 - Stations in the Maritime Services, Subpart B - Applications and Licenses

1. The authority citation for Part 80 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.19 is amended by revising the table to read as follows:

§ 80.19 Standard Forms to be used.

* * * * *

Class of station(s)	Application for	Use

* * * * *

Maritime support	Renewal of license without modification	FCC Form 452-R

* * *

3. Section 80.59 is amended by revising paragraph (c), to read as follows:

§ 80.59 Compulsory ship stations

* * * * *

(c) Application for exemption. FCC Form 820 must be used to apply for exemption from the radio provisions of Part II or III of Title III of the Communications Act, the Safety Convention, or the Great Lakes Radio Agreement, or for modification or renewal of an exemption previously granted. Applications for exemptions must be submitted to Federal Communications Commission, Waiver Requests, P.O. Box 358300, Pittsburgh, Pennsylvania, 15251-5300. Such applications must be accompanied by the appropriate fee amount, as set forth in Section 1.1102 of this Chapter. Emergency requests must be filed with the Federal Communications Commission, Office of the Secretary, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. (Note: with emergency requests, do not send the fee, you will be billed.)

* * *

D. Part 87 - Aviation Services, Subpart B - Applications and Licenses

1. The Authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.21 is amended by replacing "FCC Form 405-A" with "FCC Form 452-R" in paragraph (b) to read as follows:

§ 87.21 Standard Forms to be used.

(a) * * *

(b) * * *

Class of Station	Application for--	Use--
	* * *	
Ground.....	* * *	* * *
	* * *	* * *
	Renewal of license without modification.	FCC Form 452-R
	* * *	

3. Section 87.25 is amended by removing the entire Note following paragraph (f).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

MARC A. ALBERT	File No. BPH-870918MC
TAYLOR COMMUNICATIONS OF SYRACUSE, INC.	File No. BPH-870918ML
SALT CITY COMMUNICATIONS, INC.	File No. BPH-870918MN
D.J.'S BROADCASTING CO.	File No. BPH-870918MY

For Construction Permit for a
New FM Station on Channel 290A,
Syracuse, New York

Appearances

Donald E. Martin, Esquire, Spencer W. Weisbroth, Esquire, Harry C. Martin, Esquire, and *Andrew S. Kersting, Esquire*, on behalf of Marc A. Albert; *John J. Duffy, Esquire*, and *Nora E. Garrote, Esquire*, on behalf of Taylor Communications of Syracuse, Inc.; *David Honig, Esquire, Thomas A. Hart, Esquire*, and *Ronda R. Robinson, Esquire*, on behalf of Salt City Communications, Inc.; *Alfred C. Cordon, Esquire*, and *Dennis J. Kelly, Esquire*, on behalf of D. J.'s Broadcasting Co.; and *Paulette Laden, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: November 25, 1991; Released: December 6, 1991

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* (HDO), released July 17, 1989 (DA 89-745), the Commission designated the applications of Marc A. Albert (Albert), Taylor Communications of Syracuse, Inc. (Taylor), Salt City Communications, Inc. (Salt City), and D.J.'s Broadcasting Co. (DJ's) for comparative hearing.[1] In its HDO, the Commission set forth the following issues regarding the remaining applications:

1. To determine whether D.J.'s proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Albert, Taylor, Salt City, and D.J.'s would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The following additional issues were specified as the result of various motions to enlarge the issues filed during the course of the proceeding:

5(a). The basis for, and the validity of, the cost estimates projected by Albert to build and to operate his proposed facilities without revenue for three months;

(b). Whether Albert has sufficient net liquid assets on hand, or available from committed sources to construct and operate his proposed facilities for three months without revenues; and

(c). Whether, in light of the evidence adduced pursuant to the foregoing sub-issues, whether Albert is financially qualified.[2]

6(a). To determine whether Salt City has reasonable assurance of financing from MBIC [Minority Broadcast Investment Corporation], under what terms and conditions will that financing be provided, and whether Salt City is willing and able to meet these terms and conditions.

(b). To determine, based on the evidence adduced under the foregoing issue, whether Salt City is financially qualified to be a Commission licensee.[3]

7(a). To determine whether Albert made a false statement in his January 20, 1991, statement under penalty of perjury relative to the facts and circumstances of his being served with a lawsuit for unpaid legal fees, and, if so, the effect thereof on his basic qualifications to be a Commission licensee.

(b). To determine whether Albert has violated Section 1.65 of the Commission's rules by failing to report material information concerning its financial qualifications, and, if so, the effect thereof on its basic qualifications to be a Commission licensee.[4]

3. Issue 1 was resolved in DJ's favor pursuant to a "Motion for Summary Decision." (*See, Memorandum Opinion and Order*, FCC 89M-2254, released September 12, 1989.)

4. Prehearing or hearing conferences were held on September 15, 1989, March 19, 1990, June 7, 1990, and April 3, 1991. Hearing sessions in this proceeding were held on March 27, 28, 29, and 30, 1990; additional hearings were held on October 29, 30, and 31, 1990, and May 23, 1991. The record was originally closed on October 31, 1990 (Tr.

1376), and finally closed by *Order* of the Presiding Judge, FCC 91M-1752, released May 30, 1991, upon the acceptance into evidence of a stipulation, DJ's Ex. 34.

5. Proposed findings of fact and conclusions of law were filed by all applicants on December 18, 1990, and reply findings were filed on January 18, 1991. The Mass Media Bureau filed "Mass Media Bureau's Information Statement" relating to the FAA issue on December 11, 1990. Thereafter, additional proposed findings of fact and conclusions of law were filed by Albert, Taylor, Salt City and DJ's on July 3, 1991, and reply findings were filed by Albert and DJ's on or before July 19, 1991.

FINDINGS OF FACT

MARC A. ALBERT

Structure and Integration

6. Marc A. Albert (Albert) is a sole proprietor. He proposes 100 percent quantitative integration. Mr. Albert proposes to work full time (a minimum of 40 hours per week) as the general manager of the proposed station. Mr. Albert will supervise all aspects of the station's operations including programming, sales, technical operations, public relations, business affairs, and personnel matters. (Albert Ex. 1, p. 1.)

7. Mr. Albert is currently employed full time as the Secretary/ Treasurer of Creative Concerts, Inc., a company which promotes concerts throughout New York, Vermont, and Pennsylvania. Mr. Albert owns 25 percent of that company. At the time of the Phase I hearing, Mr. Albert was the 50 percent owner of a corporation which owns and operates a bar called "44s," located near the Syracuse University campus. Albert, at that time, spent about four hours a week on tavern business. Sometime around September 5, 1990, Albert became the 100 percent owner of the tavern. (Tr. 1464.) His time spent on tavern business has increased since he became the 100 percent owner.[5] In the event that Mr. Albert is awarded the construction permit, he will terminate his employment and divest his interest in Creative Concerts, Inc. (Albert Ex. 1.)

Local Residence

8. Albert has been a resident of both the community of license and the service area of the proposed station for more than 20 years. From 1964 until 1967, Albert resided at Scottholm Terrace in Syracuse, New York, within the community of license. Since 1967, Albert has resided primarily at 102 Dover Road, Fayetteville, New York. This residence is located within the service area of the proposed station. In addition, from approximately September 1987 until October 1989, Albert maintained a part-time residence at 5100 Highbridge Street, Fayetteville. Since October 1989, Albert has maintained a part-time residence at 615 Demong Avenue, Syracuse. If Albert is awarded the construction permit, he will move from this residence in Fayetteville and establish his permanent, full-time residence in Syracuse. (Albert Ex. 1, pp. 1-2.)

Civic Activities

9. Since 1987, Albert has been a member of the "Heart Run" Committee of the American Heart Association and has served as its Event Coordinator. (Albert Ex. 1, p. 2.) The committee meets approximately three hours per month during every month except August. For about six weeks before the organization's annual "Heart Run," Albert devotes approximately five to six hours per week planning the event. During the three days before the event, he works full time on this activity. (Albert Ex. 1, p. 2.)

Past Broadcast Experience

10. From September 1986 until April 1987, Albert was employed by FM radio station WAQX, Syracuse, New York, as its promotion director. In this capacity, Albert was responsible for coordinating on-air and off-air promotions. (Albert Ex. 1, p. 2.) Albert was fired from this position and has not worked in broadcasting since. (Tr. 129-130.)

Diversification

11. Albert has no ownership interest in any medium of mass communication. (Albert Ex. 1, p. 2.)

Auxiliary Power

12. Albert proposes to install auxiliary power equipment at the proposed station. (Albert Ex. 1, p. 2.)

Financial Issue

13. The financial issues against Albert were designated because of apparent conflicting cost estimates submitted by Albert in response to petitions to enlarge issues. Specifically, on March 16, 1990, in support of an opposition to a motion to enlarge issues filed against him by Salt City, Albert submitted a declaration, which stated, in part:

> I estimated the costs for my station to be $144,400. This figure takes into account estimates for operating the station for three months without revenue including staff salaries. To meet my projected costs, I obtained financial commitments from Chase Lincoln First Bank, N.A. of Syracuse and from my father, Harvey Albert. These two commitments, taken together, include a financial "cushion" of over $10,000.

14. Upon consideration of Albert's declaration, DJ's filed a motion to enlarge issues against Albert on March 22, 1990. The basis of DJ's motion was that Albert's proposed cost estimate ($144,400), as stated in his March 16, 1990, declaration, was insufficient as a matter of law, and that Albert was, therefore, not financially qualified. Albert filed an opposition to DJ's motion on April 4, 1990. In support of this opposition, Albert submitted another declaration, dated April 4, 1990.

15. In the April 4, 1990, declaration, Albert stated that the cost estimate of "$144,400" was a low figure because it did not include the cost of the financed portion of the building designed to house the new station. Specifically, the figure used in the $144,400 cost estimate only included the amount of the down payment on the building which was $10,000, while the total cost of the building was $100,000.

16. In his April 4th, 1990, declaration, Albert also explained that the $144,400 figure did not include his revised estimate for the legal costs of prosecuting the application. Mr. Albert's revised estimate for legal costs was $75,000, as opposed to the $15,000 originally allocated. Factoring these figures into his cost estimate, Mr. Albert stated in his April 4, 1990, declaration that his cost estimate for constructing the station and operating it without revenue for the first three months would total $294,400.

17. Albert prepared his application in August and September of 1987. During this process, he prepared a budget consisting of construction costs and expenses for the first three months of operation. (Albert Ex. 26, p. 1.) In devising his estimated budget, Mr. Albert relied on the advice of various people known to him to be knowledgeable in the broadcasting field. He sought the advice of Bill Shleman, the chief engineer of WKFM(FM), Syracuse, to help estimate the equipment, engineering, and installation costs for the new station. Mr. Albert sought and relied upon his advice because, in Mr. Albert's opinion, Mr. Shleman had expert knowledge. (Tr. 1095.) In addition to being the chief engineer at WKFM, Mr. Shleman had experience in building several radio stations. (Tr. 1097; Albert Ex. 26, p. 1.) Mr. Albert consulted with Mr. Shleman on a number of occasions, both in person and by telephone. (Tr. 1095.)

18. Albert also sought the advice of Mr. Ed Levine to help determine the costs of operating the proposed station for the first three months it would be on the air. Mr. Levine has more than a decade of experience in the field of program and operations management of commercial radio stations. He has been employed as a Program/Music Director at WAQX(FM), Syracuse, New York; as Operations Manager, WPYX/WTRY, Albany, New York; Program Director at KLOL(FM), Houston, Texas; and, since 1989, as Program Director at WJFK(FM), Washington, D.C. (Albert Ex. 28, p. 1.)

19. Mr. Levine became acquainted with Marc Albert in the mid-1980's when Mr. Levine was working at radio station WAQX. Mr. Albert asked Mr. Levine for advice about how to estimate the cost for start-up radio stations. They discussed Mr. Albert's plan for the station on several occasions in the late summer of 1987. Mr. Levine made suggestions to Mr. Albert and helped him draw up an initial proposed operating budget for the first three months that the new station would be on the air. (Albert Ex. 28, pp. 1-2.)

20. Mr. Albert consulted with his communications attorney to determine an estimate for the legal costs. (Albert Ex. 26, p. 2.)

21. Mr. Albert estimated his costs of constructing the proposed station as follows:

Antenna System	$ 25,000.00
Generating Equipment	20,500.00
Monitoring and test equipment	3,500.00
Program origination equipment	15,000.00
Building	10,000.00 (down payment)
Other items:	
Legal	15,000.00
Engineering	5,000.00
Installation	7,500.00
Other Miscellaneous	5,000.00
TOTAL	$106,500.00[6]

(Albert Ex. 26, p. 8.)

22. Mr. Albert estimated the cost of operation for the first three months as follows:

Transmitter Rental Site	$ 3,000.00
Mortgages	5,200.00
Utilities (including telephone)	2,800.00
Records, tapes, compact discs and carts	2,500.00
Music license fees	2,250.00
Postage, printing and other promotional activities, including entertainment	5,000.00
Insurance	2,400.00
Salaries (not including Marc A. Albert)	7,500.00
Taxes	1,800.00
General Maintenance	1,500.00
TOTAL	$ 33,950.00[7]
Total cost of construction	$106,500.00
Total cost of operation for the first three months	33,950.00
TOTAL COST OF CONSTRUCTION AND OPERATION FOR THE FIRST THREE MONTHS	$144,400.00[8]

(The figures, when added together, correctly total $140,450, not the $144,400 found in Albert Ex. 26, p. 8.)

23. Having originally estimated his total costs at $144,400, Mr. Albert sought financing to cover these costs. Mr. Albert knew Mr. Marlin Kisselstein, a vice president of the Chase Lincoln First Bank in Syracuse. They had worked together in conjunction with a fundraising event for the American Heart Association. Mr. Albert approached Mr. Kisselstein about financing his proposed new radio station. Mr. Albert met with Mr. Kisselstein, showed him his proposed budget, and provided him with personal information and information about his financial condition. After several visits with Mr. Kisselstein, the bank agreed to provide Mr. Albert with financing up to $100,000. This is confirmed by a letter from Mr. Kisselstein to Mr. Albert, dated September 15, 1987. (Albert Ex. 26, pp. 4, 13.)

24. Mr. Albert also approached his father, Harvey Albert, about providing some of the financing for the new station. Harvey Albert agreed to provide Marc Albert with a loan of up to $50,000 from Albert Homes of Elmira, a corporation owned 100 percent by Harvey Albert. In addition, Harvey Albert also agreed to construct the building to house the station, holding a mortgage on the building for $90,000, after a $10,000 down payment. These arrangements were generally set forth in a letter to Mr. Albert from his father, Harvey Albert, dated September 13, 1987. It was understood that Mr. Albert would make monthly installments on repayment of this loan beginning approximately six months after the station went on the air. (Albert Ex. 26, pp. 4, 14; Albert Ex. 27, pp. 1-2.) Mr. Albert was familiar with the financial status of his father, Harvey Albert, and was familiar with the financial status

of Albert Homes of Elmira because Mr. Albert performed bookkeeping services for Harvey Albert on a regular basis, usually about once per month. Mr. Albert therefore knew that Albert Homes would be financially capable of effectuating its commitment to him. (Albert Ex. 26, pp. 4-5; Albert Ex. 27, pp. 6-13.)

25. Thus, to meet his estimated budget of $144,400, Albert was relying on the bank loan commitment for $100,000 and the loan commitment from Harvey Albert for $50,000, for a total of $150,000. According to Albert, this total, combined with the $5,000 allocation for miscellaneous items in Mr. Albert's budget, provided a cushion of approximately $10,000.

26. Since September 1987, Mr. Albert has reviewed and corroborated his original cost estimates. In doing so, Mr. Albert consulted again with Mr. Levine, and he consulted with Mr. Bob White, President of Armstrong Transmitter Corporation in Syracuse, a retail supplier of broadcast equipment. Mr. Albert asked Mr. White to provide him with a bid to sell Mr. Albert the necessary equipment and to install it. Armstrong Transmitter Corporation's bid for the turnkey installation was $54,860. (Albert Ex. 26, pp. 2, 10-12.) In his original estimate, Mr. Albert allotted a total of $76,500 to cover the costs of buying and installing an antenna system, generating equipment, monitoring and test equipment, program origination equipment, and engineering. All of these items were included in the turnkey bid from Armstrong. (Albert Ex. 26, p. 8.)

27. Harvey Albert has agreed to help his son finance the construction and operation of the station. Since 1987, Harvey Albert had a line of credit of up to $90,000 from the Chase Lincoln First National Bank.[9] In September 1990, Harvey Albert secured a further line of credit from the bank in the amount of $100,000.[10] As of August 31, 1987, Harvey Albert's net worth was $918,925.[11]

Misrepresentation and Section 1.65 Issues

28. A financial issue against Albert was tried in a Phase II hearing which commenced on October 29, 1990. That issue sought to determine, *inter alia*, the basis for and validity of Albert's cost estimates, and whether sufficient net liquid assets were available to construct and operate. Albert represented that he had increased his estimate of legal fees from $15,000 to $75,000 (a $60,000 increase). (Tr. 1109-1110.) He further stated as follows:

> Although the total estimate for legal fees has been included in my total estimated budget, as a practical matter I have been meeting these expenses and plan to continue to do so by using a combination of funds derived from my own business earnings of approximately $70,000 per year and from additional funding from my father. It is my understanding that these occasional disbursements from my father for prosecution costs do not come from the sources identified for and committed to covering the total budget of estimated costs for this project.
>
> (Albert Ex. 26, p. 6.)

29. Albert stated he had paid Reddy, Begley & Martin (RBM) about $26,000, owed them about $50,000, and had been billed about $72,000. (Tr. 1104-1105.)

30. As to the new estimate of $75,000 in legal fees, Albert's December 18, 1990, Phase II Findings and Conclusions represented that Albert "has been meeting these expenses and plans to continue doing so by using a combination of funds derived from his own business earnings of approximately $70,000 per year and from additional funding from his father . . . ." Albert further represented that although the total for legal fees has been included in his total estimated budget, as a practical matter, he has been meeting these expenses and plans to continue to do so. Since Albert has been meeting his legal expenses timely, the increase in the cost estimate is immaterial, since legal expenses may be met on a current basis. (DJ's Ex. 26, p. 5.)

31. Albert's January 18, 1991, Reply Findings and Conclusions restated Albert's contention that "as a practical matter, Mr. Albert has been meeting his prosecution expenses on an ongoing basis out of resources not included in his reserved budget." (DJ's Ex. 27, p. 2.) Moreover, Albert further stated:

> DJ's also argued that Albert failed to budget for the $6,000 hearing fee. While this is conceded, it is irrelevant. Albert has met this, and certain other legal expenses, as they arose, on an ongoing basis, using current funds not included in his fixed budget.
>
> (DJ's Ex. 27, p. 3.)

32. On January 23, 1991, two days after filing his reply findings, Albert filed with the Secretary of the Commission a "Section 1.65 Statement." (DJ's Ex. 24.) This statement, which was signed by Marc Albert on January 20, 1991, was submitted under the penalty of perjury and declared that the following statements, *inter alia*, were true to the best of his knowledge:

> In my April 4, 1990, declaration (which was attached to my Opposition to DJ's Broadcasting Company's March 22, 1990 Motion to Enlarge Issues), after consultation with Reddy, Begley & Martin, my counsel at that time, I revised my proposed construction and operation budget to reflect an increase in the estimate for legal fees, increasing that line item from $15,000 to $75,000. At the Phase II hearing, I stated that I believed that I owed Reddy, Begley & Martin approximately $50,000. (Tr. 1104.)
>
> On September 6, 1990, Reddy, Begley & Martin filed a civil action against me in the Superior Court of the District of Columbia. In that action, Reddy, Begley & Martin claimed that it had billed me $92,829.55, and that I continued to owe it $73,763.94. However, I was not served with a copy of the complaint until October 29, 1990, after I had testified at the Phase II hearing. My attorney has filed an answer to that complaint denying the claim for legal fees made by Reddy, Begley & Martin.
>
> (DJ's Ex. 24, p. 1.)

33. Marc Albert was served with a "Summons and Complaint" in a law suit initiated by his former lawyers, Reddy, Begley & Martin by process server David S. Felter at 9:50 a.m. on October 29, 1990, at 2000 L Street, N.W., Suite 200, Washington, D.C. (DJ's Ex. 25.) The official

transcript of the October 29, 1990, hearing session indicates that the hearing session commenced at 10:00 a.m. (Tr. 1004.) Marc Albert was the third witness to take the stand on behalf of his application; his testimony commenced following the mid-morning break. (Tr. 1087.) Marc Albert's testimony was interrupted by the lunch break, which took place at 12:30 p.m. (Tr. 1099.)

34. On February 11, 1991, Albert provided a declaration attached to his opposition to the "Motion to Dismiss, to Enlarge Issues, or in the Alternative, to Draw Adverse Inferences" filed February 1, 1991, by DJ's and Salt City. In that declaration, which is tracked by his May 6, 1991, Phase II Direct Case, Albert recanted his January 20, 1991, statement that he was not served with the RBM Complaint until after he testified at the Phase II hearing, and he stated as follows:

> A copy of the Complaint was served upon me on October 29, 1990, just a few minutes prior to [when] I entered the FCC courtroom to appear and give testimony at the Phase II hearing session. As I was making my way to the hearing, I was served in the hallway by the water fountain just outside of the Commission's courtrooms at 2000 L Street, N.W., in Washington. I did not have time to read or to consider the Complaint prior to the commencement of the Phase II hearing session that day.
>
> The Complaint was folded up in a cover sheet. When it was given to me, I immediately placed it in my brief case without unfolding it. It remained in my brief case until I visited my local attorney in Syracuse later in the week of October 29. I did not unfold it or read it during the intervening time. I did not read the Complaint until that meeting with my local attorney several days after the Phase II hearing when I gave it to him.
>
> I did not know the contents of the Complaint while I was testifying at the Phase II hearing on October 29, 1990. I was very focused on this fact when I prepared my "Section 1.65 Statement." I wanted to convey the idea that my testimony was wholly independent of the Complaint and that I was ignorant of the contents of the Complaint when the testimony was given. While preoccupied with portraying this true fact, I misstated the timing of my physical receipt of the Complaint. Technically, I did receive the Complaint shortly prior to the beginning of the Phase II hearing. However, I did not come to possess information about the contents of the Complaint until several days later.

(Albert 29, pp. 2-3.)

35. Before going to Washington, D.C., to testify at the October 29, 1990, hearing, Albert was advised by his local lawyer, Michael Harris that:

> There is chance that you will be served when you get there by Harry Martin or someone representing him. If someone comes up to you and gives you service, take the service, put it in your brief case and bring it back to me.

(Tr. 1450-1451.)

Albert admitted that he knew that he was going to get served by Harry Martin, that it was going to be a law suit initiated against Albert for RBM's claim for legal fees that Albert hadn't paid. (Tr. 1452.) When asked why Albert did not disclose the law suit at the Phase II hearing, Albert explained that he didn't disclose the law suit at the Phase II hearing because "I didn't really think it meant anything until I got back to my lawyer. I was doing what my lawyer said, bring it back home to him." (Tr. 1453.)

36. Albert received and saw bills sent from RBM monthly from September 1987 through October 1990. (Tr. 1422, 1425.) Bills sent to Albert from RBM in the first weeks of August, September and October, respectively, were for $71,227.38, $71,508.21, and $71,508.21. (DJ's Ex. 29, pp. 2-3.) These bills were sent to Albert at his 102 Dover Road address in Fayetteville, New York. (Tr. 1422.) Albert was turning over the RBM firm's bills to his Syracuse attorneys, Peter Panels and Michael Harris. (Tr. 1420, 1422.) He had done so every month since April 1990 because he couldn't make "headway or tailway over the bill." He turned it over to his local lawyer because he thought it was outrageous. (Tr. 1423.)

37. Albert was more than 30 days behind in meeting his legal bills to the RBM firm as early as February 1, 1990. At this point, he owed the RBM firm approximately $8,400. At the end of March or early April 1990, Albert spoke with Harry Martin of the RBM firm "to discuss a payment plan with him, because I realized I couldn't handle the size of the bill, as it had gotten out of my day-to-day living expenses." (Tr. 1430.)

38. On March 26, 1990, Albert paid the RBM firm $5,000, which reduced his debt from $20,000 to $15,000. (Tr. 1431.) However, he did not request additional funds from his father who had agreed to participate in financing Albert's application. (Tr. 1432.) As of February 1990, Albert did not have an express understanding with the RBM firm that would have permitted him to pay fees on a deferred basis. (Tr. 1434.)

39. RBM withdrew as counsel for Albert on or about August 31, 1990. Albert's Phase II Direct Case claimed that he dismissed RBM because of a conflict of interest -- RBM's involvement (of an unknown and unstated nature) with Walter Threadgill, President of Minority Broadcast Investment Corporation (MBIC), which is Salt City's source of funds for construction and initial operating funds. Specifically:

> I dismissed Reddy, Begley & Martin when a conflict of interest on the part of that firm gave rise to a dispute about the amount of the fees that I owed. I learned that Reddy, Begley & Martin had a relationship with Walter Threadgill in other matters not related to this proceeding. Mr. Threadgill is the purported financier backing another applicant in this proceeding, Salt City Communications, Inc. I learned of this conflict when Harry Martin informed me that he could not file a petition on my behalf against Salt City because of his firm's relationship with Mr. Threadgill. At that point, I stopped making payments to Reddy, Begley & Martin. That firm then launched the law suit against me.

(Albert Ex. 29, p. 1.)

40. It appears that on April 27, 1990, Harry Martin penned a handwritten note to Marc Albert transmitting two motions in this case filed by DJ's -- one against Albert, the other against Salt City. In pertinent part, Harry Martin wrote:

> The petition against Salt City, however, butresses our pleading, which has not yet been acted on, and adds good arguments regarding real party-in-interest *vis-a-vis* Walter Threadgill. (We prepared a draft pleading on this point, but had to give it to Kelly due to Mr. Threadgill's relation to another case we're in.)
>
> (DJ's Ex. 33.)

Notwithstanding the above, Harry Martin was the lead examiner in the taking of Walter Threadgill's deposition on June 21, 1990. (Salt City Ex. 16, pp. 5-64, marked for identification but not admitted.)

41. Albert gave a check in the amount of $5,000 to Harry Martin on or about June 25, 1990. This check, Albert's check number 304, was returned for insufficient funds. (Tr. 1428, 1484.) Albert made the check good twenty days later. (Tr. 1428.) Thus, contrary to his sworn written testimony, Albert in fact made a payment to the RBM firm after he learned about the Walter Threadgill situation. (Tr. 1484-1485.)

42. The Section 1.65 reporting issue was specified because Albert did not timely amend his application to report the filing of the law suit by his former lawyers and to assess the impact of such suit on his financial qualifications. According to Albert, he has now raised his estimate for total legal costs to $115,000. This in turn would make his total budget requirement $212,760. He claims reliance on $220,000 in financing commitments. (Albert Ex. 29, p. 5.) Thus, in the light most favorable to Albert, he would have a cushion of $7,240 ($220,000 less $212,760).

43. RBM billed Albert a total of $92,829.55. (Albert Ex. 29, p. 5.) Of that amount, the RBM firm has obtained a default judgment against Albert for $71,508.21. (DJ's Ex. 28.) With respect to the Don Martin law firm, Albert had paid them $10,000 as of May 23, 1991. (Tr. 1444.) As of the date of the Phase III hearing, the Don Martin firm had generated time and out-of-pocket expenses "right around the 18 to 20 thousand dollar range." (Tr. 1446.) Albert has a deferred payment arrangement with the Donald Martin firm. If the case were to have ended on May 23, 1991, Albert would have owed the Don Martin firm in the neighborhood of an additional $8,000. (Tr. 1446-1447.) Don Martin had not given Albert an estimate for what the Phase III hearing and the ensuing "proposed findings" and "reply findings" would cost. (Tr. 1447.) Likewise, Don Martin had not given Albert an estimate of the costs -- time and out-of- pocket expenses -- to take this case to the Review Board. (Tr. 1449.)

44. According to Albert, the banker at the Chase Lincoln First Bank, Marlin Kisselstein, "knows that there's a proceeding going on," referring to RBM's law suit against Albert. Albert indicated that he told Kisselstein about the proceeding in January 1991. (Tr. 1441.) The default judgment against Albert was entered on March 1, 1991. (DJ's Ex. 28.) Kisselstein had given no further document to Albert as to what his bank would do with respect to the $100,000 loan letter relied upon by Albert. (Tr. 1441.)

TAYLOR COMMUNICATIONS OF SYRACUSE, INC.

Structure and Integration

45. Taylor Communications of Syracuse, Inc. (Taylor) is a corporation organized under the laws of the Commonwealth of Massachusetts. John J. Taylor, III, owns 36.2 percent of the voting stock and serves as President, Treasurer, and a Director of the applicant. Lillian M. Taylor owns 12.8 percent of the voting stock and serves as Clerk and a Director of the applicant. John J. Taylor, Jr., owns 51 percent of the voting stock and serves as a Director of the applicant. Henri J. DesPlaines does not have any ownership in the applicant, but serves as the Executive Vice President. (Taylor Ex. 1.)

46. The principals of Taylor do not propose to be integrated in the operations of the proposed station on a day-to-day basis. (Taylor Ex. 2.)

Diversification

47. John J. Taylor, Jr., Lillian M. Taylor, and John J. Taylor, III, own 51 percent, 12.8 percent, and 38.2 percent, respectively, of J. J. Taylor Companies, Inc. John J. Taylor, Jr., is the Chief Executive Officer, Chairman of the Board, and a Director. Lillian M. Taylor is Clerk and a Director. John J. Taylor, III, is President, Treasurer, Chief Operating Officer, and a Director. Henri J. DesPlaines is Executive Vice President and Chief Financial Officer. J. J. Taylor Companies, Inc. is the licensee of WCOD(FM), Hyannis, Massachusetts; WXXL, Leesburg, Florida; WEAT-AM and WEAT(FM), West Palm Beach, Florida; and WIVY(FM), Jacksonville, Florida. (Taylor Ex. 3.)

48. John J. Taylor, Jr., Lillian M. Taylor, and John J. Taylor, III, own stock in Taylor Communications of Rochester, Inc., an applicant for a permit to construct a new FM station on Channel 290A, Rochester, New York. John J. Taylor, Jr., is 51 percent shareholder, Clerk, and a Director. John J. Taylor, III, is a 36.2 percent shareholder, President, Treasurer, and a Director. Henri J. DesPlaines is Executive Vice President. (Taylor Ex. 3.)

Auxiliary Power

49. Taylor proposes to install auxiliary power generating equipment at both the studio and transmitter sites to ensure continued operation in the event of a power outage. (Taylor Ex. 4.)

SALT CITY COMMUNICATIONS, INC.

Structure of Applicant

50. Salt City Communications, Inc. (Salt City) is a New York corporation. As originally formed, it had the following stockholders: Merrill Charles, Locksley Spencer, Roosevelt Bouie, and Robert Short. Mr. Charles held a 24 percent equity interest in the corporation and is the corporation's sole voting stockholder. In addition, Charles is the Chairman, Vice President, Treasurer, and the only Director of Salt City. Messrs. Spencer, Bouie and Short each held a 25 1/3 percent non-voting equity interest in the corporation. Carol Charles, Merrill Charles' wife, is the Secretary of the corporation, though she is not an owner. (Salt City Ex. 1.)

51. On March 29, 1990, Salt City amended its application to report that Merrill Charles had acquired Robert Short's non-voting shares, and that the Minority Broadcast Investment Corporation (MBIC), Salt City's source of financing, will receive warrants to acquire non-voting stock amounting to 75 percent of the equity in Salt City. These warrants may not be exercised for three years. The ownership change was reported at the March 27, 1990, hearing session. (Tr. 212.)[12]

52. On July 3, 1990, Salt City further amended its application to report that on June 19, 1990, Mr. Charles' 25 1/3 non-voting shares had been exchanged for 25 1/3 voting shares, and that in the event MBIC exercises its warrants to acquire a 75 percent non-voting interest in Salt City, Mr. Charles' equity interest and the equity interests of all other shareholders would be reduced in proportion to the extent of their respective holdings in Salt City. This amendment was unopposed and was accepted by *Order*, FCC 90M-2463, released August 9, 1990.

53. The following represents the present structure of the ownership of the equity of Salt City; the ownership of the equity of Salt City following the conversion of Mr. Charles' non-voting stock to voting stock; and, the ownership of the equity of Salt City in the event that MBIC exercises the warrants to be granted to it in exchange for the financing of Salt City:

	Present Ownership	Following Conversion of Mr. Charles' Shares	Upon exercise of MBIC Warrants
Merrill Charles			
Voting	24 percent	49.33 percent	12.33 percent
Non-voting	25.33 percent	0 percent	0 percent
Locksley Spencer			
Voting	0 percent	0 percent	0 percent
Non-voting	25.33 percent	25.33 percent	6.33 percent
Roosevelt Bouie			
Voting	0 percent	0 percent	0 percent
Non-voting	25.33 percent	25.33 percent	6.33 percent
MBIC			
Voting	0 percent	0 percent	0 percent
Non-voting	0 percent	0 percent	75 percent

(Salt City Ex. 11, pp. 1-2.)

54. At all times, Merrill Charles has held all the voting stock of Salt City. Thus, despite the changes which have occurred, and even if MBIC exercises its warrants and acquires a 75 percent equity in Salt City, Merrill Charles has at all times maintained his 100 percent voting interest and will continue to be the sole voting stockholder of Salt City.

Integration

55. Merrill B. Charles, the President of Salt City Communications, Inc., will work at the station as general manager on a full-time basis (at least 40 hours per week). In that position, Mr. Charles will ultimately be responsible for all management, administrative, budgetary, and programming decisions relating to the operation of the station. (Salt City Ex. 3, p. 1.)

56. Mr. Charles, at time of the hearing, was employed as a Photo Journalist at WTVH-TV (Channel 5), Syracuse, New York, and had held this position since September 1984. In the event Salt City is awarded the construction permit, Mr. Charles will resign his position at WTVH-TV, or, if employed elsewhere, Mr. Charles will resign from any other such full time or part-time employment as he might hold in order to effectuate his integration proposal. (Salt City Ex. 3, p. 1.)

57. On July 7, 1991, Charles resigned from his position at WTVH-TV and began working as a self-employed broadcast consultant during the summer. He was primarily engaged in assisting with the operation of Syracuse radio station WOLF-AM. On September 1, 1991, Mr. Charles will assume a position as an Assistant Professor in the Communications Studies Department at the State University of New York at Oswego. Mr. Charles' contract with the university is for one year, from September 1, 1991, to August 31, 1992. In the event the grant of Salt City's application becomes final before August 31, 1992, Mr. Charles will devote himself part-time, at least 20 hours per week, to the beginning of the process of construction of the proposed station and after August 31, 1992, full time to the completion of construction and the operation of the station. Mr. Charles' commitment to the university is for the 1991-1992 academic year and does not extend beyond that time.

Local Residence

58. Mr. Charles has resided in Syracuse, New York, since August 1975. (Salt City Ex. 3, p. 1.)

Minority Ownership

59. Mr. Charles is a black American citizen. (Salt City Ex. 3, 2.)

Civic Activities

60. From December 1977 to the present, Mr. Charles has been a member, Phi Beta Sigma Fraternity, Inc. Mr. Charles served as Treasurer for the undergraduate chapter at Syracuse University from September 1978 through August 1979, and as Treasurer for the graduate chapter from January 1986 to the present. The fraternity is a social service organization. Mr. Charles has been the Central New York Director from September 1982 to the present. In this capacity, Mr. Charles represents the National/Regional Office of the Fraternity in Central and Eastern New York and Northern Pennsylvania. During 1989, Mr. Charles devoted approximately 15 to 20 hours monthly to this activity. From May 1981 to December 1982, Mr. Charles was on the Board of Directors and a member of Fund Raising Committee, Dunbar Association, Inc. The Association operates the Dunbar Center, a black community social and neighborhood pre-kindergarten, and after school programs. During the time he served on the Board, Mr. Charles devoted approximately four hours per month to this activity. In April 1982, Mr. Charles received the Medallion of Inspiration from the Office of Minority Affairs of Syracuse University. During the summer of 1982, Mr. Charles was a member of the Minority School Finance Conference Committee, Urban League of Onondaga County. He assisted in the development of a workshop and conference for educators and community leaders. Mr. Charles devoted approximately four hours monthly to this activity. From the summer of 1982 to the

present, Mr. Charles was the co-founder and Director, Syracuse Black Media Coalition (SBMC). SBMC is the principal media watchdog organization in the Syracuse area. As SBMC's co-founder and thus far only Director, Mr. Charles developed and implemented an internship program in conjunction with local broadcast facilities and educational institutions. During 1989, Mr. Charles devoted approximately 15 to 20 hours monthly to this activity. From August 1989 to the present, Mr. Charles has been a member, Syracuse/Onondaga Branch of the National Association for the Advancement of Colored People. (Salt City Ex. 3, pp. 5-7.)

Broadcast Experience

61. Mr. Charles earned an M.S. degree (Telecommunications Management) from Syracuse University's Newhouse School of Public Communications in August 1981. In September 1973, Charles was selected to participate in a special All City Workshop for radio at the city of New York's WNYE(FM). In November 1975, during his first year at Syracuse University, Mr. Charles joined the staff of the University's full power, noncommercial station WAER(FM) as a music announcer. He subsequently held several positions at the station, including Minority Affairs Director (September 1977 to May 1978), Public Affairs Producer (September 1977 to August 1979), and Station Manager (September 1978 to January 1980). (Salt City Ex. 3. p. 2.)

62. From March 1979 to March 1980, Mr. Charles worked full time as an announcer and music director at WSOQ-AM, North Syracuse. During the period September 1980 to September 1982, Mr. Charles worked part-time (20 hours weekly) as a Public Relations Assistant with the Syracuse University College. Approximately half of his time in this position consisted of producing television and radio programs showcasing the college's course schedule and local community leaders. From January to May 1982, Charles taught the course "Producing Programs for Cable Television." In August 1981, Mr. Charles joined Cooke Cablevision as a part-time access producer and produced the minority affairs program "Heading East." (Salt City Ex. 3, p. 3.)

63. From October 1982 to February 1984, Mr. Charles worked as music director and announcer at WOLF-AM in Syracuse until he joined WTVH-TV in September 1984. Mr. Charles remains active as an independent producer for Cooke Cablevision and continues to supervise an SBMC internship program in conjunction with the Syracuse University Community Internship Program. In January 1988, Mr. Charles added the responsibility of producer of the WTVH-TV public affairs program "Straight to the Source." From October 1988 to March 1989, Mr. Charles had the additional responsibility of serving as WTVH-TV's weekend producer of news. He was responsible for the content of the weekend 6:00 p.m. newscast and the supervision of news personnel. (Salt City Ex. 3, pp. 4-5.)

Diversification

64. Salt City has no attributable media interests. (Salt City Ex. 2.)

Financial Issue

65. Salt City has at all times relied upon financing to be furnished by the Minority Broadcast Investment Corporation (MBIC). Because the terms and conditions relating to this financing changed during the course of the pendency of the Salt City application, an issue was specified to determine whether Salt City has reasonable assurance of financing from MBIC, under what terms and conditions, and whether Salt City is willing and able to meet those terms and conditions.

66. At the time it filed its original application, Salt City relied upon a September 17, 1987, letter from MBIC to Merrill B. Charles, III. The key provisions of this letter are as follows:

> . . . MBIC wishes to confirm its present intention to provide and assemble a $600,000.00 financing, through a group of lenders which will be formed by MBIC as the lead investor, in the event your pending application for a construction permit is granted by the Federal Communications Commission.
>
> The exact terms and interest rate on the loan will be determined at the time of disbursement and will also depend on economic conditions. It is anticipated that the loan would be structured as follows:
>
> The loan will be in the form of a seven (7) year long term senior loan, with a moratorium on the payment of principal only for a twenty-four (24) month period. Thereafter, for a sixty (60) month period principal and interest will be paid on a quarterly basis. Further, a pledge of SSC's stock as well as the personal guarantees of the company's principals will be required.
>
> We understand that for purposes of your FCC filing you are required only to show reasonable assurance of your financing and you do not require nor presently desire a legally binding commitment for which this corporation would charge a commitment fee. Accordingly, the final decision on the availability of the loan and its terms will of necessity be made at the time the loan is actually to be funded and will depend upon our review of your financial condition and proposal at that time as well as MBIC's then current lending policies as well as general financial market condition.
>
> (Tr. 1121; Albert Ex. 9, p. 1.)

The letter was signed by Walter Threadgill who is the Chief Executive Officer, Chief Investment Officer, and majority owner of MBIC. (Tr. 1322; Salt City Ex. 8, p. 1.)

67. Prior to receiving the 1987 MBIC letter, Salt City's Mr. Charles spoke to Mr. Threadgill several times on the telephone. Mr. Charles had previously prepared a 42-page business plan for Salt City and had sent that to Mr. Threadgill about six weeks prior to filing the application. (Tr. 1130.) Mr. Charles and Mr. Threadgill spoke in general about what the letter would contain, and then Mr. Threadgill sent Mr. Charles the letter. (Tr. 1131.) Mr. Charles did not send financial information about himself to Mr. Threadgill nor did he provide any financial information about his partners Short, Spencer, and Bouie. No information was provided by Mr. Charles to Mr. Threadgill about what assets Mr. Charles owned. (Tr. 1132; 1324-1325.) At the time the 1987 MBIC letter was

written, Mr. Threadgill did not propose to Mr. Charles the specific collateral requirements of MBIC, although generally personal guarantees and a security interest in the station was required. (Tr. 1132, 1327-1328.) According to Threadgill, he was not concerned about financial statements with respect to the individuals because the people they finance are not individuals with lofty balance sheets. (Tr. 1324.)

68. During their discussions, Mr. Charles answered numerous, fairly tough questions from Mr. Threadgill concerning his background, the background of his principals, and his plans for operating the station. At no time did Mr. Threadgill say anything which would have remotely led Charles to believe that the MBIC letter would be written as a favor for Charles or for anybody else. (Salt City Ex. 7, p. 2.) According to Mr. Charles, he would not have taken the project this far if he ever believed Salt City lacked the financial ability to put the station on the air and operate it well. That is why Mr. Charles proceeded the way he did, by writing a lengthy business plan and going to two MESBICs for financial help.[13] (Salt City Ex. 7, p. 4.)

69. Before issuing the letter to Salt City, Threadgill conducted an analysis of the Syracuse market. He also considered the business plan written and submitted by Charles and whether there were other possible new stations which would impact the proposed Salt City station. The purpose of all this was to determine whether there was a reasonable opportunity for success with respect to the business plan. Threadgill also considered where Charles had been employed, and whether he had a generalized knowledge of the industry. (Tr. 1335-1336.) Based on his analysis, Threadgill was satisfied that the Salt City proposed loan was one that he would make. He was satisfied as to the quality of the marketplace and the quality of the individual (Charles). (Tr. 1335-1336.) Threadgill was ready, willing, and able to provide $600,000 in financing to Salt City. (Tr. 1341.)

70. Mr. Charles and Mr. Threadgill discussed the possibility of MBIC requiring an equity participation in Salt City prior to the filing of the Salt City application. (Tr. 1133.) Specifically, Mr. Threadgill, in September 1987, made it clear to Mr. Charles that equity in Salt City had to be given up. (Tr. 1134.) Indeed, MBIC as well as other "MESBICs" in September 1987 required "start-up" borrowers such as Salt City to issue warrants permitting the lender to acquire up to 60 percent of the equity of the borrower (Tr. 1332; Salt City Ex. 8, p. 4.) This requirement did not appear in the September 1987 MBIC letter. According to Mr. Threadgill, the September 1987 letter was not meant to be all encompassing. It was a letter that was meant to provide reasonable assurance to Mr. Charles that MBIC would do this deal and in none of the letters submitted to the Commission has MBIC ever, in an initial or reasonable assurance letter, indicated what the interest rate or the warrant take-back position or any of that would be. The September 17, 1987, letter represented, in Threadgill's mind, his reasonable assurance to Mr. Charles that should Charles secure a construction permit for the station, MBIC would finance the deal. (Tr. 1333.)

71. Following the issuance of the September 17, 1987, letter, MBIC twice requested status reports from Salt City. Salt City provided the required updates to MBIC by May 25, 1989, and December 13, 1989.

72. The letter of September 17, 1987, was followed up by a letter to Mr. Charles from Mr. Threadgill, dated March 21, 1990. This letter stated, in pertinent part, as follows:

> We are confirming that [the September 17, 1987, letter] has remained in effect, and will continue to be in effect until such time as a decision is made by the FCC on SCC's application with the following changes and/or additions:
>
> 1. MBIC will have a right of first refusal to provide financing for construction and initial working capital for the station. That is, in the event any offer to finance your station is made prior to MBIC's furnishing financing, MBIC shall be shown such offer and shall have 30 days in which to elect to match it. If it does, then SSC shall proceed with MBIC and not any other offeror.
>
> 2. The anticipated terms of the loan, were it to be made now, would be as follows. MBIC would provide $550,00 [sic] and SCC's stockholders would provide SCC with $75,000 in cash, as SCC's equity contribution. Within 30 days thereafter, they will also give MBIC a note for $25,000 with interest at 14%, interest to be deferred and added as due to principal until the fifth anniversary of the loan, when all principal and interest due shall be payable.[14]
>
> 3. As SCC draws down the loan proceeds, MBIC will acquire warrants to purchase SCC's stock, with appropriate safeguards against dilution for 75% of the outstanding stock. The stock will be in every respect the same as other SCC shares except that it will be non-voting. The price of the warrants in the aggregate shall not exceed $1,000.
>
> 4. The only personal guarantees that will be required will be those of yourself [Merrill B. Charles] and your wife.
>
> 5. A financing fee of 2% of the entire amount of the loan will be paid to MBIC when SCC first draws down any part of the loan.
>
> 6. In the event that SCC, through no fault of MBIC, does not draw down all of the loan, within three months of issuance of a firm FCC construction permit, it shall pay to MBIC a fee of $100,000; this may be paid in cash or by giving MBIC a promissory note for such amount in form acceptable to MBIC, payable at 14% interest over a five year period, with principal and interest amortized as if the note were to be repaid over a seven year period, with a ballon [sic] payment in the fifth year, commencing on the date SCC notifies MBIC that it, SCC, will not draw down all of said loan as provided above, or when said three months have expired without said loan having been so drawn down.
>
> (Albert Ex. 14, pp. 1-2.)

73. As previously noted, the September 17, 1987, letter depended "upon our [MBIC's] review of your financial condition and proposal [of Salt City] at that time as well as MBIC's then current lending policies as well as general financial market condition." (Albert Ex. 9, p. 1.) Thus, the March 1990 letter confirmed that the September 1987 letter has remained in effect, and will continue to be in

effect, until such time as a decision is made by the FCC on [Salt City's] application with the changes noted in the March 1990 letter.

74. The March 1990 letter required Salt City stockholders to provide to Salt City $75,000 in cash as Salt City's equity contribution. This infusion of capital was necessary in order to eliminate the requirement that the limited partners personally guarantee the loan, a condition that Threadgill originally wanted. (Tr. 1145-1146.)

75. Because Mr. Charles knew that the March 21, 1990, letter would require additional equity contributions from the shareholders of Salt City, he verified from Roosevelt Bouie and Locksley Spencer that they would be willing and able to make those commitments. Mr. Charles spoke with each, and both confirmed to him that they could and would meet all conditions contained in the March 21, 1990, letter. Also, Mr. Charles was aware of his own capabilities and was ready and able to meet his share of those commitments. One of those conditions is a personal guarantee from Charles and his wife which will be honored. (Salt City Ex. 7, p. 3.)

76. In mid-June 1990, Mr. Charles executed a memorandum to Salt City's shareholders, memorializing, *inter alia*, that he had received $13,000 and a promise of an additional $37,000 from his mother, Ethel Charles, to permit him to meet his $49,500 financial obligations to Salt City in connection with the March 21, 1990, MBIC letter. (Tr. 1119; Salt City Ex. 11.) Mrs. Charles confirmed this in a June 11, 1990, letter to her son. (Salt City Ex. 12, p. 3.)

77. Messrs. Spencer and Bouie confirmed that they had agreed to and would meet MBIC's March 1990 terms, including dilution of their equity positions if MBIC exercises its warrants and payment of $24,750 each. (Salt City Ex. 12, pp. 1-2.) Because Carol Charles' personal guarantee is required by MBIC's March 1990 letter, Carol Charles confirmed in writing that she agreed to MBIC's terms. (Salt City Ex. 12, p. 4.) Also, Mr. Charles has agreed to contribute $49,500 to Salt City. (Salt City Ex. 11.)

78. Charles intends to secure the funds he needs to contribute to Salt City from his mother. His mother has already given Charles $13,000 as a gift and has agreed to lend him $37,500. (Salt City Ex. 12, p. 3.) Mrs. Charles is the Director of Social Services for Brookdale Hospital and has an annual income of $61,000. Moreover, Mrs. Charles has unencumbered properties with an estimated value of $200,000. These properties include two residences and a lot. Mr. Charles has spoken to his mother and has been informed that she will raise the money needed to meet her commitment to her son by using available cash and by mortgaging her house which she owns free and clear. The house is valued at $140,000. (Tr. 1154-1155; Salt City Ex. 14, pp. 7-8.)

79. Mr. Locksley Spencer's individual financial statement shows the availability of total current assets of approximately $490,000 and total current liabilities of $339,009. The statement shows that Spencer for the year July 1, 1989, to March 31, 1990, made an operating profit of $123,353. Also, Spencer has real estate, purchased in 1979 for $165,000 and valued at $550,000 in June 1990. (Salt City Ex. 14.) Spencer has shown his ability and willingness to meet his commitment to Salt City. (Tr. 1160; 1264-1265).

80. Roosevelt Bouie is a professional basketball player who presently is playing in Italy. His financial statement show cash on hand and on deposit of $240,000. He has a net worth in excess of $800,000 and liabilities of $132,000 (mortgage) and a contingent liability of $17,000. (Salt City Ex. 14, p. 5.) Mr. Bouie has confirmed his ability and willingness to meet his commitment to Salt City. (Tr. 1157-1158.)

81. On June 20, 1990, Threadgill wrote another letter to Salt City clarifying the earlier March 21, 1990, letter. The key provisions of this letter are as follows:

> 1. MBIC would expect to pay an aggregate exercise price for the warrants of $1,000. This sum would be paid to Salt City by MBIC at the time of exercise (i.e., exchange the warrant for stock).
>
> 2. MBIC expects Salt City to repay the $550,000 loan whether or not MBIC exercises its warrant. If the loan were made today, MBIC would charge 14% interest. That rate is subject to change based on conditions then existing. We call your attention to the fact that MBIC is regulated by the Small Business Administration, and may not charge interest in excess of that permitted. Concurrently, the SBA's maximum is 15.25% for such loans. We expect that any loan would be amortized over a 7-10 year period. MBIC would allow a 2-3 year moratorium on principal, so that Salt City would pay interest only in the early years.
>
> 3. MBIC's documents contain put and call provisions. Beginning a fixed number of years (3-5) after the Warrant is issued, Salt City will have the right to require MBIC to sell some or all of its warrant to Salt City, and MBIC will have the right to require Salt City to buy back some or all of MBIC's warrant. This put/call would operate as follows:
>
> > (a) Before any call (but not put), Salt City would have to retire any remaining portion of its original $550,000 indebtedness to MBIC.
> >
> > (b) The put/call price is the market value of the warrant (or stock, if the warrant has been exercised). If Salt City and MBIC are unable to agree on the market value of the warrants, each chooses an appraiser and their findings are averaged, unless the higher one is over 20% more than the lower, in which case the appraisers select a third one, whose appraisal is conclusive.
>
> (Salt City Ex. 10, p. 1.)

82. In the June 20, 1990, letter, Threadgill informed Charles of the changes in the financial markets that occurred since his first letter in 1987. Specifically, Threadgill wrote as follows:

> In the period of nearly three years since the 1987 letter, major changes took place in the capital markets. Leveraged buyouts fared badly, junk bonds were no longer seen as answers, and the savings and loan industry entered a crisis period. The problems of investing venture capital wisely increased greatly,

to put it mildly; major Wall Street firms suffered severe setbacks, and a profitable investment firm became a rarity.

MBIC and other Mesbics have thus been put in the position of having to seek more equity, and senior creditor status, to offset the greater risk of loss of all or part of the investment.

(Salt City Ex. 10.)

83. It was always part of Threadgill's intentions to syndicate out part of the financing for Salt City. (Tr. 1347.) However, prior to issuing the September 17 letter, Threadgill did not talk to any other lenders concerning the financing of Salt City's application. He intended that there would be a minimum of two and a maximum of four other lenders required. The decision about which and how many other lenders would be utilized is a decision that would be made at the time the loan was made. (Tr. 1349.) Mr. Threadgill could not state with certainty the amount of the financing that MBIC itself would provide. The maximum legal lending limit of MBIC today is $400,000. The maximum legal lending limit of MBIC on September 17, 1987, was $300,000. Threadgill identified BROADCAP and SYNCOM as other MESBICs which would possibly participate in the financing of Salt City. (Tr. 1350-1351.) It is a routine practice for MESBICs to participate in this type of financing. (Tr. 1347-1349.)

84. Walter Threadgill's May 1990 declaration attempts comprehensively to explain MBIC's reasons for proceeding as it did with Salt City. The declaration states, in pertinent part, as follows:

I wrote the March 21, 1990 to Salt City letter for two reasons. First, I was advised that Salt City was getting closer to the time when a license might issue. Salt City has always been eager to win this broadcast permit, and thus I felt it appropriate to revisit and possibly refine the 1987 letter . .

The second reason I wrote the March 21, 1990 letter was that I had had the experience of spending a great deal of time and effort doing market research with respect to applicants for which I'd written reasonable assurance letters, with no income or gain whatsoever for MBIC. What often happens is that if such applicants win broadcast permits, they take our reasonable assurance letters to other lenders, and then use them for funds. MBIC is in business to lend money, and I wanted some protection to be sure that since we had worked with Salt City for such a long time, our efforts would result in a profit for MBIC as well as for Salt City.

That is why the March 21, 1990 letter contains a penalty for the use of other funds, although the penalty as negotiated was such that it would not be so large as to entirely preclude Salt City from using any other source of funds. Furthermore, the letter contains a right of first refusal, so the MBIC still would have to match other lenders' terms. Thus the letter is entirely fair.

The broadcast lending market in 1990 is somewhat different, and much more conservative, than the broadcast lending market in 1987. It is still possible to syndicate a $550,000 loan for a major market FM startup. However, it did not seem wise to offer Salt City financing that MBIC could not syndicate. The letter I wrote on March 21, 1990 represents a commitment which is fair, and which reflects current reality in broadcast venture lending. The letter provides that MBIC will have warrants to acquire up to 75% of Salt City's stock. All of that stock would be nonvoting. Under the SBA's rules, none of the warrants can be exercised for three years after the station signs on the air.

The 25%/75% equity split for the warrants reflects changes in the broadcast financial markets since mid-1989. As is commonly known, many broadcasters bought their stations in the mid-1980s for 12-14 times cash flow. These multiples were often far too high, and many of these stations drowned in debt service. Consequently, in 1989 most lenders, especially smaller and thus more vulnerable lenders such as MBIC, began to require warrants for higher percentages of nonvoting stock. Before mid-1989, MBIC and the other MESBICs typically would have required warrants for 60% of the stock of a startup company doing its first deal.

The number now most commonly used is 75% for first-time startups. There are four MESBICs presently offering financing to minority broadcast entrepreneurs: MBIC, BROADCAP, Syndicated Communications, Inc. (SYNCOM) and CVC Capital Corp. I am familiar with the terms of loans and investments made by each. The terms of the financing to be provided pursuant to the March 21, 1990 letter I wrote to SSC [Salt City] are in line with those of other MESBICs.

All lenders prefer operators with proven broadcast operating track records. Salt City does not have such a record now. If Salt City does well, it will be in a position to get money on more favorable terms.

Broadcast lending is especially risky for first time buyers and startups. Obviously a license cannot be pledged or treated as an asset. Therefore, the only assets which can be pledged as collateral for loans are hard assets such as transmitters and equipment. These items depreciate rapidly, and are never worth anywhere near the value of the station, since that includes the value of the license as well.

Furthermore, conditions in the real estate market, fueled in large part by the failure of so many savings and loan companies, has caused much if not all subordinated equity money otherwise available for syndication in broadcast lending to dry up. Thus, in order to continue to find reasonable assurance to Salt City under present market conditions, MBIC had to maintain its commitment in force under terms realistic for 1990, not terms realistic for 1987.

These market conditions require lenders to exercise great care in putting together highly leveraged broadcast transactions. MBIC has exercised that caution, but has done so in a way which still permits Salt City's present stockholders to retain a substantial percentage of equity and which allows MBIC absolutely no voting power.

(Salt City Ex. 8, pp. 2-5.)

Air Hazard Issue

85. The FAA objected to the tower construction proposed by each of the applicants on the grounds that it would cause electromagnetic interference (EMI) to an FAA localizer in Syracuse. The determination of EMI resulted from application of the FAA's Airspace Analysis Model computer program (FAA Model), the accuracy of which has been the subject of substantial controversy between the FAA and the Commission. (Tr. 7-24, 990-997.) As a result, an air hazard issue was specified against all applicants.

86. The applicants attempted to resolve this issue with the FAA but were unable to obtain individual resolution of these objections through communications with the FAA. (Tr. 7-24, 990-997.) On April 24, 1990, the applicants filed a "Joint Petition for Leave to Amend and For Summary Decision" seeking jointly to amend their applications to designate a new transmitter site atop the State Tower Building in Syracuse. (Joint Ex. 1.) The new facilities would be mounted on an existing structure to which no additional height would be added. In those circumstances, the Commission's rules do not require notification to the FAA of the proposed construction. *See*, Part 17 of the Commission's rules.

87. Notwithstanding the above, the Bureau applied the FAA Model to the applicants' joint proposal and found potential for EMI. It had been the Bureau's position in the past to propose the grant of construction permits in these circumstances with a one-year condition that the licensee would take corrective action to eliminate any harmful interference. In this case, the Bureau disavowed this practice and asked the Presiding Judge to hold in abeyance both acceptance of the joint amendment and ruling on the motion for summary decision pending further negotiations between the Commission and the FAA regarding the accuracy of the FAA Model and this case in particular. (*See*, "Mass Media Bureau's Comments on Joint Petition for Leave to Amend and For Summary Decision" filed by the Bureau on May 3, 1990.)

88. By *Memorandum Opinion and Order*, FCC 90M-1790, released June 22, 1990, the Presiding Judge granted the applicants' joint petition for leave to amend but held in abeyance a ruling on the motion for summary decision regarding the air hazard issue, pending further negotiations between the FAA and the Commission. The Bureau has now indicated that voluntary resolution of this situation between the Commission and the FAA does not appear likely. (Tr. 1010.) On December 11, 1990, the Bureau advised the Presiding Judge that it had espoused the grant of a conditional permit in another FM proceeding with a similar FAA problem. (*See*, Mass Media Bureau's "Information Statement" filed December 11, 1990.) There is no valid reason for a different result here.

D.J.'S BROADCASTING CO.

Structure of Applicant

89. D.J.'S Broadcasting Co. (DJ's) is a New York general partnership. DJ's consists of four general partners, each partner having one vote in the affairs of the partnership, and holding a 25 percent ownership interest in the partnership. The partners are: Joseph J. Jackler, Doris Jackler, Jay L. Jackler, and Roberta K. Jackler. Joseph J. Jackler and Doris Jackler are husband and wife, and the parents of Jay L. Jackler. Jay L. Jackler and Roberta K. Jackler are husband and wife. Each partner has made an initial capital contribution of $75. Joseph and Doris Jackler will provide all funding for construction and initial operation of the proposed station, on a loan basis. After all loans are repaid to Joseph and Doris Jackler, the profits of the station will be shared on an equal basis. (DJ's Ex. 1.) Roberta and Jay Jackler have not made any other contribution to the applicant other than the $75 each. (Tr. 893.)

Integration

90. DJ's proposes the full time integration of three of its four general partners: Joseph J. Jackler, Doris Jackler, and Roberta K. Jackler. Jay L. Jackler will not work at the station. (DJ's Ex. 1, p. 2.)

91. *Joseph J. Jackler* will be the general manager of the new Syracuse FM station, devoting full time, a minimum of 40 hours per week, on a day-to-day basis, to the operation of the station. As general manager, Mr. Jackler would supervise the overall operation of the station and would be the chief financial officer for the station. (DJ's Ex. 2, p. 2.)

92. Joseph Jackler retired from the practice of accounting in 1989. At that time, he sold his interest in the Syracuse firm of Jackler, Nelkin, Liberman and Company to four certified public accountants who had been in business with him, including his son Jay L. Jackler. This firm is now known as Jackler, Nelkin, Ewanyk and Company. As a part of the agreement leading to Mr. Jackler's retirement, an "employment agreement" was entered into. The purpose of this agreement was to keep Mr. Jackler on the accounting firm's payroll, at a minimum wage, for purposes of Mr. Jackler's partaking in the firm's group insurance program. The agreement commits Mr. Jackler to 1,500 hours of work per year. (DJ's Ex. 2, p. 3.) In the event that DJ's application is granted, it is Mr. Jackler's intention to abandon his "employment agreement" with his former firm prior to the time the proposed Syracuse station commences program test authority, to permit him to work full time at the station. The current partners of Jackler, Nelkin, Ewanyk and Company have assented to Mr. Jackler's plan. Mr. Jackler will reside in Syracuse full time in the event DJ's application is granted. (DJ's Ex. 2, pp. 3-4.)

93. Joseph Jackler served as accountant and financial advisor to a number of broadcast companies, such as WENY, Inc. (WENY/WLEZ/WENY-TV), Elmira, New York; South Jersey Radio, Inc. (WOND/WMGM-FM/WMGM-TV), Pleasantville/ Atlantic City/Wildwood, N.J.; Vermont Radio, Inc. (WVMT(AM), Burlington, Vermont, and former owner of WSYB/WRUT-FM, Rutland, Vermont); James Broadcasting Company, Inc., WJTN/WWSE-FM, Jamestown, New York, and WERC, Inc., WLKK/WLVU-FM, Erie, Pennsylvania; and Sarasota Bradenton Florida Television Company, WXLT-TV, Sarasota, Florida. (DJ's Ex. 2, p. 5.)

94. Mr. Jackler is a former director of The Jewish Home of Central New York. With his wife, Mr. Jackler established the Joseph and Doris Jackler Family Foundation, which has made monetary contributions in the Syracuse area, including Syracuse University, Friends of the Zoo, The Jewish Home of Central New York, and the Onondaga County Cancer Society. (DJ's Ex. 2, p. 5.)

95. *Doris Jackler* would be the program director of the new Syracuse FM station, devoting full time, a minimum of 40 hours per week on a day-to-day basis, to the operation of the station. As program director, Doris Jackler would manage the day-to-day programming effort of the station, and would oversee the announcing, news and public affairs staff. Additionally, Doris Jackler would be responsible for the implementation of DJ's Equal Employment Opportunity Program. Doris Jackler is not employed and has no children to care for. In the event DJ's application is granted, she will live year-round in Fayetteville, a suburb of Syracuse. (DJ's Ex. 3, pp. 1-2.)

96. In the period between 1970 and 1985, Doris Jackler served on the Board of Directors of the Jewish Home for the Aged on Genessee Street in Syracuse. She continues to be a member of the ladies' auxiliary of this home. In 1989, she volunteered as a fund raiser for the Syracuse chapter of the National Cancer Society. In past years, she has volunteered in the gift shop of the Crouse Irving Memorial Hospital in Syracuse. She also gave her efforts to establish the Onondaga County Chapter of the Cystic Fibrosis Foundation. (DJ's Ex. 3, p. 3.)

97. *Roberta Jackler* would be the general sales manager for the proposed station, devoting full time, a minimum of 40 hours per week, on a day-to-day basis, to the operation of the station. In this position, Roberta Jackler would be responsible for the selection, training and supervision of the sales staff, for marketing and promotions, and for the overall operation of the sales department. Roberta Jackler is not presently employed. She has two children, ages 9 and 7, who are attending elementary school. Day care is available for these children for after-school and vacation periods. Mrs. Jackler will have no other outside employment. (DJ's Ex. 4, pp. 1-2.)

98. Roberta Jackler is now a committee co-chairperson for the annual Tel-Auc auction fund raising program of WCNY-TV, Channel 24, Syracuse, the area's public television station; she first became involved with this activity in 1989 as a fund raiser. Since 1989, she has been the Band Coordinator for the Village of Manlius' July 4 parade. She has just completed a term (1989-1990) as financial secretary of The Jewish Home of Central New York, in Syracuse. In 1978-1979, she was a trustee and financial advisor to the synagogue Temple Concord in Syracuse. (DJ's Ex. 4, p. 3.)

99. Doris Jackler and Roberta Jackler are females. (DJ's Ex. 3; DJ's Ex. 4.)

100. With the exception of an approximate six-month period in 1950-1951, Mr. Jackler resided in Syracuse between 1947 and 1965. Since February 1965, he and his wife Doris have owned their home at 5223 Duane Drive, Fayetteville, New York. Fayetteville is a village within the Town of Manlius, and the residence is within the 1 mV/m contour of the proposed station. Since 1979, Mr. Jackler and his wife have maintained a winter residence at Pompano Beach, Florida. Mr. Jackler's accounting practice was based in Syracuse from 1955 through 1989. (DJ's Ex. 2, pp. 4-5.)

101. Doris Jackler was born in Syracuse, New York, on March 31, 1931. From 1931 to 1965, Mrs. Jackler resided in Syracuse, New York, except for a period of approximately six months in 1950-1951 when she resided in Catskill, New York (outside the proposed service area). From 1965 to the present, her primary residence has been at 5223 Duane Drive, Fayetteville, New York. (DJ's Ex. 3, p. 2.)

102. Roberta Jackler moved to Syracuse at age 5 in 1959. She and her family resided at various locations in Syracuse, New York, until September 1978, except for a period between September 1972 and September 1974 when she was attending the University of Denver, Denver, Colorado. In September 1978, she was wed to Jay L. Jackler, and continued to reside within the 1 mV/m contour of the proposed station. She would continue to live in her present residence in Manlius, New York, in the event DJ's application is granted. (DJ's Ex. 4, p. 2.)

Diversification

103. DJ's has no cognizable media interests. Neither Doris Jackler, Jay Jackler, nor Roberta Jackler have any ownership, offices or directorships in any media outlets. (DJ's Ex. 1, p. 2.)

104. Joseph Jackler is an officer, but not a stockholder or director, of both WENY, Inc., and South Jersey Radio, Inc., which holds AM, FM, TV and translator/LPTV licenses in the Elmira and Atlantic City markets, as well as two weekly newspapers in southern New Jersey. In the event that DJ's application at Syracuse is granted, Mr. Jackler will resign his offices with South Jersey Radio, Inc., and WENY, Inc. (DJ's Ex. 2, pp. 1-2.)

Auxiliary Power

105. DJ's proposes to install auxiliary power generation equipment at both its transmitter and studio locations. (DJ's Ex. 5.)

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

106. This proceeding now involves four mutually exclusive applicants vying for a construction permit to build a new FM station in Syracuse, New York. In addition to the standard comparative issue, several basic qualifying issues have been specified. Because only basically qualified applicants are entitled to comparative consideration,[15] the basic issues will first be considered and resolved before the applicants are evaluated under the comparative issue.

MISREPRESENTATION ISSUE re: Albert

107. The misrepresentation issue was specified because Albert had falsely stated that he was "not served with a copy of" a Complaint filed by his former law firm seeking $73,763.64 in unpaid legal fees "until October 29, 1990, after I had testified at the Phase II hearing." The Phase II hearing was scheduled, *inter alia*, to explore a financial issue against Albert, including Albert's cost estimates, an integral part of which was his estimated legal costs. When this false statement is considered in the context in which it was made, together with other misstatements made by Albert during the course of this proceeding, it is apparent that Albert has engaged in willful deception, lacked candor, and was not at all forthcoming in providing information relating to his financial qualifications.

108. The misrepresentation regarding when Albert was served with the law suit was contained in a "Section 1.65 Statement" filed by Albert on January 20, 1991, after Proposed Findings of Fact and Reply Findings on the financial issue directed against Albert were submitted. In his direct testimony at the Phase II hearing on the financial issues, Albert testified on direct examination that he had increased his estimate for legal fees, but, "as a prac-

tical matter, I have been meeting these expenses and plan to continue to do so . . " However, Albert later testified that his former law firm had billed him about $72,000 and that he owed them about $50,000. Moreover, in his Findings of Fact and Conclusions of Law and again in his Reply Findings, Albert asserted that he was meeting his legal expenses timely and on a current basis. These representations were untrue. Specifically, the law firm had billed Albert nearly $93,000 and had served Albert with a law suit, prior to the time Albert testified at the Phase II hearing, seeking $73,763.94 in unpaid legal fees. Yet, Albert did not mention the suit during his Phase II testimony, nor did he reveal the amount of money his former law firm was seeking. Albert must have had knowledge of the amount of money his former law firm was billing him because the bills, *inter alia*, for August, September, and October 1990, were sent to him. He also was alerted by his local lawyer that he might be served with a Complaint from his former law firm for unpaid legal fees. He was indeed served with the Complaint *prior* to testifying at the Phase II hearing on financial issues, but never once mentioned the law suit, the outcome of which was relevant to the issues then being litigated. Rather, Albert waited until after the Proposed Findings and Reply Findings on the Phase II hearing were submitted to report the filing of the law suit and proceeded to misrepresent when he had been served with the suit. Clearly, Albert could not have acknowledged being served before he testified because his testimony at the Phase II hearing was inconsistent with the claim being asserted in the suit, and the question would immediately arise as to why he did not reveal the filing of the law suit in his testimony. By asserting under penalty of perjury that he was not served until *after* he testified, Albert sought to provide a reason why he did not mention the filing of the suit in his Phase II testimony.

109. Albert attempts to explain the false statement by asserting that he did not read the suit prior to testifying; that he merely put it in his briefcase and turned it over to his local lawyer when he returned to Syracuse; and that he was attempting to convey the impression that he did not know the content of the suit when he stated that he was not served until after he testified. This explanation is rejected. It is nothing more than a *post hoc* rationalization of Albert's lame attempt to explain a total lack of candor.

110. The above is not the only instance where Albert has misrepresented facts or provided inconsistent and conflicting information. When a petition to enlarge was filed against him, he originally estimated on March 16, 1990, his proposed construction and operating costs at $144,400. Thereafter, when another applicant sought financial issues claiming that Albert's cost estimate of $144,400 was inadequate as a matter of law, Albert on April 4, 1990, submitted a new estimate of $294,400 for construction and operation of the station. (Paragraphs 3-16.) Thus, in an apparent effort to avoid the specification of financial issues, in the short space of three weeks, Albert's cost estimate went from $144,400 to $294,400.

111. There are other instances where Albert's representations were shown to be inconsistent with the actual facts. For example, Albert stated that he was relying on his father to provide financing for the prosecution of his application and construction of the station. Yet, he later testified that he was unwilling to ask his father for even as much as the $8,400 he owed his former law firm in February 1990. (Tr. 1432.) Moreover, in his direct case, Albert testified that he stopped making payments to his former law firm when he learned of what he perceived to be a conflict of interest on the part of his former counsel, which was in late April 1990. Yet, Albert made a $5,000 payment to his former counsel in July 1990, well after learning of what he perceived to be a conflict of interest. These examples of false statements do not instill confidence in Albert's ability to deal truthfully with the Commission. They tend to dispel the notion that Albert's false sworn statement as to when he was served with the law suit was an innocent mistake.

112. In its 1986 *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 59 RR 2d 801, 823 (paragraphs 60-61), the Commission reiterated that "the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest." The Commission noted that it "is authorized to treat even the most insignificant misrepresentation as disqualifying." Here, Albert has willfully misrepresented when he was served with a law suit. He also failed to be completely forthcoming in providing information of potential significance relating to his financial qualifications. Furthermore, there are repeated instances of inconsistent and conflicting statements by Albert. Such conduct warrants denial of Albert's application. *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 4596 (1990); *KQED, Inc.*, 5 FCC Rcd 1784 (1990); *WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132 (D.C. Cir. 1985); *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (1982).

SECTION 1.65 ISSUE re: Albert

113. Albert has also violated the provisions of Section 1.65 by not timely reporting the law suit filed by his former counsel seeking $73,763.94 in unpaid legal fees. This section of the Commission's rules requires an amendment to the application, or report within 30 days, when information therein is no longer substantially accurate and complete or when there has been a change as to any other matter of decisional significance in a Commission proceeding. Here, issues were being litigated regarding Albert's financial qualifications, and he failed to timely report the filing of a law suit for unpaid legal fees arising from this proceeding, a matter directly relevant to the issues being litigated. Because the matter of Albert's legal expenses was of decisional significance in resolving the issues relating to his financial qualifications, Albert was obligated to timely report the filing of the law suit. *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (paragraph 9) (1991); *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861 (1990). Rather, Albert waited until Findings of Fact and Reply Findings on his financial qualifications were filed (in which he falsely represented that he was paying his legal expenses on a current basis) until he reported the law suit. This failure to timely report (the law suit was served on Albert on October 29, 1990, but it was not reported until January 20, 1991) constitutes a violation of Section 1.65 of the Commission's rules. The failure to timely report related to a decisionally significant matter and is disqualifying. In any event, when added to the adverse conclusion under the misrepresentation issue, it further demonstrates Albert's unfitness to be a licensee.

FINANCIAL ISSUE re: Albert

114. Because questions were raised about Albert's cost estimates and his available committed sources of funds, issues were specified to determine Albert's financial qualifications.[16] To establish financial qualifications, an applicant must have reasonable assurance of having sufficient funds to construct its proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). Albert made efforts to ascertain construction and operation costs. However, he grossly underestimated the legal costs he would incur in this hotly-contested proceeding which originally involved five applicants. More importantly, however, questions persist as to the availability of funds to meet anticipated expenses of $294,400. While Albert relies upon financing from the Chase Lincoln First Bank in Syracuse and his father, evidence has been developed which casts serious doubt on the availability of such financing. For one, Albert has not sought funds from his father to meet his legal expenses. Indeed, Albert testified that he "wouldn't ask my father to pay that kind of amount for me and to borrow from him." (Tr. 1432.) Moreover, a default judgment was entered against Albert in the amount of $71,508.21. There is no indication from the bank that the letter relied upon by Albert remains valid in light of the default judgment. Clearly, the existence of the default judgment is a relevant factor in evaluating Albert's reasonable assurance of the availability of bank financing. The Commission has previously indicated that the credit-worthiness of a potential borrower is a factor that must be considered in determining financial qualifications. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168 (1980). The existence of the default judgment against Albert raises a serious question as to his credit-worthiness and the availability of the bank loan. When this is added to Albert's apparent reluctance to borrow substantial sums of money from his father, Albert cannot be found to have established reasonable assurance of financing to build and operate his proposed station. Thus, Albert has not demonstrated that he is financially qualified, and his application must be denied.

FINANCIAL ISSUE re: Salt City

115. Financial issues were specified against Salt City to determine whether it had reasonable assurances of financing from MBIC, under what terms and conditions, whether Salt City was willing and able to meet these terms and conditions, and whether Salt City is financially qualified. The Findings set forth the terms and conditions under which MBIC will make available a loan to Salt City in the amount of $550,000. (*See*, paragraphs 72 and 81 of the Findings.) Moreover, the Findings demonstrate that the stockholders of Salt City are willing and able to meet the terms and conditions of the MBIC loan. (*See*, paragraphs 74-80 of the Findings.) Thus, Salt City has reasonable assurance of financing in the amount of $550,000 and is financially qualified.

116. The other applicants raise a host of arguments challenging Salt City's financial qualifications. Thus, it is argued that MBIC did not review sufficient data to determine the credit-worthiness of Salt City and the terms of the loan were not "fleshed out" until 1990; that the lender lacks ability to make the loan, that it exceeds its lending limits, and that while MBIC intends to syndicate the loan, no showing in writing has been made as to the willingness of other lenders to participate; that the non-voting stockholders have not agreed to the terms of the loan; that Mr. Charles cannot rely on his mother to provide the $37,500 he needs to contribute to Salt City; that the September 1987 letter did not establish Salt City's financial qualifications and such terms were changed by the letters written in 1990. Therefore, Albert, DJ's, and Taylor conclude that Salt City is not financially qualified.

117. The Presiding Judge is unpersuaded by these arguments. First, MBIC required and received a detailed business plan from Mr. Charles before agreeing to issue the September 17, 1987, loan commitment letter. In addition to the 42-page business plan, Mr. Threadgill asked Charles numerous questions about his background, the background of the other principals, and his plans for operating the station. Threadgill explained that he also conducted an analysis of the Syracuse market before issuing the letter, but was not concerned about financial statements because the people his MESBIC finance do not have lofty balance sheets. Viewing the record as a whole, the September 17, 1987, letter from Threadgill to Salt City was issued only after a review of the project by Threadgill and his determination that Salt City and Mr. Charles were worthy of his company's financial commitment letter and had a reasonable opportunity for success. Threadgill issued the letter because he was genuinely interested in providing a $600,000 loan to Salt City. Thus, the arguments, that insufficient review was made by Threadgill of Salt City's credit-worthiness or that the letter was in the nature of an "accommodation" letter, are rejected.

118. Although the terms and conditions of the proposed loan from MBIC to Salt City changed, this does not invalidate the financing or demonstrate that Salt City was not or is not financially qualified. As explained by Threadgill, the economy, and lending practices in particular, has changed during the period between the issuance of the September 1987 letter and the final terms as expressed in the 1990 letters. These changes, which reflect the more current lending practices of MBICs, demonstrate that the dealings between Mr. Charles and MBIC have been good faith arrangements which have kept pace with the changing economic landscape. Indeed, the terms and conditions under which MBIC will provide Salt City with financing may be considered extremely onerous and one-sided. But these are private arrangements which the parties are free to negotiate.[17] The September 17, 1987, letter represented a good faith and genuine expression on the part of MBIC to lend Salt City $600,000, and Mr. Charles was justified in relying on this letter for Salt City's financial qualifications. While all the terms and conditions that were ultimately agreed upon were not spelled out in the September 17, 1987, letter, this does not mean that Salt City lacked financial qualifications. The issues that were specified merely go to the question of what were the terms and conditions of the loan, whether Salt City and its principals can meet those terms and conditions, and whether it had reasonable assurance of financing. The fact that the terms and conditions changed does not mean that Salt City did not have financing or that it was not financially qualified when it filed its application.

119. MBIC's lending limit, at this time, is $400,000, and the limit was $300,000 at the time the September 17, 1987, letter was written. Because MBIC was not able to finance Salt City by itself, it always intended to syndicate part of the financing with two to four other lenders. Threadgill identified BROADCAP and SYNCOM as other

MESBICs which would possibly participate in the Salt City financing. No statements were obtained from other possible lenders reflecting their willingness to participate in the financing to be assembled by MBIC, and, therefore, arguments are made that Salt City is not financially qualified. The question, however, is whether there is reasonable assurance that MBIC can arrange and deliver a financing package to Salt City in accordance with the commitment letters.

120. In *KIST Corp.*, 99 FCC 2d 173 (1984), *affirmed*, 102 FCC 2d 288 (1985), the Commission refused to credit a commitment letter in the amount of $2,000,000 where the bank's lending limit was only $150,000. Thus, in *KIST*, the lending bank had to secure participation by other lenders of $1,850,000, almost the entire amount of the proposed loan. In contrast, MBIC at the time of the September 17, 1987, letter, could have funded one half of the proposed loan by itself. Now, it can fund $400,000 of the proposed $550,000 loan. This is a far cry from the situation found in *KIST*.[18] Moreover, MBIC has experience in syndicating loans with other MESBICs. Indeed, it is a routine practice for MESBICs to participate in this type of financing, and the president of MBIC, an expert in arranging financing for minority broadcast applicants, foresees no problem in financing Salt City. Because only a small part of the Salt City loan will have to be syndicated, and further because it is a routine practice for MESBICs to participate in financing minority broadcast applicants, the Presiding Judge is confident that the financing to be provided Salt City by MBIC is reasonably available. The original letter to Salt City made it clear that MBIC would "provide and assemble a $600,000 financing, through a group of lenders which will be formed by MBIC as the lead investor . . " The Findings reasonably establish the willingness and ability of MBIC to meet its commitment. There is nothing in the way of affirmative evidence to indicate the contrary. Clearly, MBIC (as well as other MESBICs) is in the business of financing minority stations. *See, Storer Broadcasting Company*, 70 FCC 2d 709 (1979). That is all that MBIC is proposing to do. It is concluded that the financing MBIC is committed to providing will be forthcoming, and the arguments to the contrary are rejected.

121. Despite arguments to the contrary, Salt City has established that its stockholders are ready, willing, and able to meet the terms and conditions of the MBIC financing. Each stockholder has demonstrated a willingness to have his equity position diminished to secure the financing and each has shown that he is capable of meeting his individual financial commitment. In this regard, both Spencer and Bowie have shown that they are men of some financial substance and will have no problem meeting their limited financial commitments. Mr. Charles has to rely on his mother to provide him with an additional $37,000. (She has already provided her son with $12,500.) Mrs. Charles has a well-paying job, has unencumbered properties valued at $200,000, including her personal residence valued at $140,000. She intends to generate the necessary funds by mortgaging her house and will rely on her available cash. Because the value of Mrs. Charles' unencumbered property ($200,000) is more than four times the amount of money she will need to give her son ($37,000), it is concluded that the necessary funds will be available. (*See, Kaye-Smith Enterprises*, 98 FCC 2d 675 (1984).) Thus, the arguments that Charles will not have the funds needed to secure the MBIC financing are lacking in merit, and they are rejected.

122. In summary, Salt City has satisfactorily met the financial issues that have been specified. It has shown reasonable assurance of the availability of financing. What is required is "reasonable assurance," not evidence of availability beyond a moral certainty. Salt City has met the reasonable assurance test, and arguments to the contrary are based on nothing more than speculation. Salt City is found financially qualified.

AIR HAZARD ISSUE

123. The applicants have amended their applications to specify a site that comports with all the Commission's technical requirements and which do not require notification to the FAA. The FAA was served with the applicants' proposal for their current site but has failed to participate in these proceedings or to raise any objections about the applicants' current site. That site is already the location for other telecommunications facilities serving the Syracuse area.

124. In the past, the Commission has resolved questions of electromagnetic interference by placing an appropriate condition on the construction permit. This was the approach taken by the Review Board in *Texas Communications Limited Partnership*, 5 FCC Rcd 5876 (1990), and it is the present policy of the Mass Media Bureau. Thus, the Presiding Judge will resolve the air hazard issue in favor of the applicants and condition the permit awarded the successful applicant.

COMPARATIVE ISSUE

125. Albert has been disqualified and is not entitled to comparative consideration.[19] *Louis Adelman*, cited *supra*. With regard to the other three applicants, the case must be evaluated under the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings* (Policy Statement), 1 FCC 2d 393. Therein, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public, and (2) a maximum diffusion of control of the media of mass communications.

126. DJ's and Salt City have no attributable media interests and, therefore, have an advantage over Taylor which is chargeable with a total of five broadcast stations. Further, because Taylor is proposing no integration, it cannot be considered a serious contender for the construction permit at issue in this proceeding, particularly in light of the integration commitments and lack of any diversification impediment by both DJ's and Salt City. Thus, the contest is between DJ's and Salt City, and, because they are equal on the diversification criteria, the "best practicable service" is dispositive. This evaluation consists of the degree of integration of ownership into management of the proposed station and, where appropriate, consideration of enhancement factors relating to the participating owner.

127. Salt City seeks 100 percent integration credit because its sole voting stockholder, Mr. Charles, will be the full time general manager of the proposed station, devoting a minimum of 40 hours per week to the station. The claim for 100 percent integration credit is challenged on the basis of several arguments. First, it is argued that the

structure of Salt City was in a state of flux and therefore no integration credit should be awarded. But, this argument completely ignores the clear fact that Mr. Charles has at all times since the inception of Salt City been the only voting stockholder, and the only individual making the decisions and in total control of the applicant. The percentage of equity ownership has changed and an original non-voting stockholder dropped out of the corporation at an early date. But these changes did not disturb the 100 percent exclusive voting control enjoyed by Mr. Charles and upon which his claim for 100 percent integration credit is based. Thus, the changes in non-voting ownership or in equity percentages have no bearing on the 100 percent integration credit to which Charles is entitled because of his continuous 100 percent ownership and control of the voting stock.

128. It is further argued that, notwithstanding the fact that the warrants to be awarded MBIC in connection with the financing is for non-voting stock, because Threadgill has been retained by Salt City to act as a consultant regarding settlement, his interest is active, not passive, and therefore the 75 percent equity interest must be attributable and factored into the integration analysis. These arguments are rejected because they are based on compounded speculation.

129. First, Salt City is not obligated to take the financing offered by MBIC and can go elsewhere upon the payment of a $100,000 penalty. Thus, there is no certainty that MBIC will ever acquire warrants which will be convertible into non-voting Salt City stock. Secondly, even if the warrants are issued, the put/call provisions make it uncertain that MBIC will ever acquire stock in Salt City. Specifically, these provisions enable Salt City to purchase some or all of its warrants, and MBIC has the right to require Salt City to purchase some or all of the warrants. Furthermore, even if MBIC acquires warrants which are not repurchased pursuant to the put/call provisions, they cannot be exercised for a period of three years after the station goes on the air under existing Small Business Administration regulations. Thus, the potential acquisition of non-voting stock by MBIC is far in the future. Finally, although Threadgill has been retained as a consultant, such consultancy is limited to settlement, and there is no showing that he has performed any services for Salt City or that he will perform such services in the future. To find an attributable interest in Salt City by Threadgill requires indulging in compounded speculation on events that may or may not occur. Such speculative arguments are unsupported and too tenuous to justify diminishing Salt City's 100 percent integration credit.

130. Mr. Charles has recently taken a job as an Assistant Professor in the Communications Studies Department at the State University of New York at Oswego. Because Charles' one-year contract will not expire until August 31, 1992, DJ's argues that Charles is not in a position to fulfill his integration commitment. Charles, on the other hand, states that he will devote part-time to the construction of the station until August 31, 1992, then full time thereafter.

131. Because it is unlikely that this case will be finally resolved before August 1992, there is no reasonable basis for concluding that Charles will not be available to fulfill his integration commitment. But, even in the unlikely event the case is completed before August 1992, it is not reasonable to expect the station to be completely constructed and in operation before August 1992. Therefore, Charles' proposal to devote part-time during construction until August 1992 is not unreasonable. It does not impair or negate his commitment to work full time at the station when the station commences operation which in all likelihood will be after August 1992. Certainly the Commission does not require broadcast applicants to remain stagnant and unemployed during the pendency of an application before the Commission. Charles' position as an Assistant Professor is of short duration and in no way invalidates his integration commitment or his ability to implement it. DJ's arguments are rejected.

132. Having credited Salt City with 100 percent integration credit,[20] it is clear that Salt City is the comparatively superior applicant. DJ's receives only 75 percent integration credit. Because the difference in integration credit is so great, qualitative factors need not be considered. *Kennelwood Broadcasting Company, Inc.*, 6 FCC Rcd 2894 (1991); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (1982); *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (1981); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (1979). But, it should be noted in passing that Salt City has qualitative factors that are superior to the other applicants even if these factors were considered. Specifically, Salt City is entitled to 100 percent minority enhancement credit; local residence and substantial and significant civic involvement; and past broadcast experience. As previously noted, Albert has been disqualified, and Taylor has no comparative factors in its favor. Between Salt City and DJ's, Salt City is preferred under the comparative issue, and a grant of its application will best serve the public interest.[21]

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Salt City Communications, Inc. (File No. BPH-870918MN) for a construction permit for a new FM station on Channel 290A in Syracuse, New York, IS GRANTED, subject to the following conditions:

That Merrill Charles will sever all connections with Station WTVH-TV prior to the commencement of program test authority;

Upon receipt or notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

IT IS FURTHER ORDERED that the competing applications of Marc A. Albert (File No. BPH-870918MC), Taylor Communications of Syracuse, Inc. (File No. BPH-870918ML), and D.J.'s Broadcasting Co. (File No. BPH-870918MY) ARE DENIED.[22]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] The application of Huston Telecom, Inc. (Huston) was also designated for hearing. However, in a *Memorandum Opinion and Order* released November 15, 1990 (FCC 90M-3622), the Presiding Judge dismissed the Huston application. Such dismissal was affirmed by the Review Board and the Commission. *See, Marc A. Albert*, 6 FCC Rcd 13 (1991); 6 FCC Rcd 2603 (1991).

[2] These financial issues specified against Albert were contained in a *Memorandum Opinion and Order* of the Presiding Judge released May 16, 1990 (FCC 90M-1164).

[3] These issues against Salt City were added by a *Memorandum Opinion and Order* of the Presiding Judge released May 16, 1990 (FCC 90M-1165).

[4] These issues were specified against Albert in a *Memorandum Opinion and Order* of the Presiding Judge, released March 27, 1991 (FCC 91M-1098).

[5] Albert did not report the fact that he had acquired 100 percent ownership of the tavern, and that his time commitments to that business had increased. (Tr. 1464.)

[6] In his original construction cost estimate, Albert included a line item for "Antenna land (to be leased)." He estimated $1,000.00 per month to cover this proposed cost. This line item was inadvertently duplicated by Mr. Albert in his operating cost estimate as "Transmitter Rental Site."

[7] In adding his estimated operating costs, Mr. Albert apparently under-estimated by $50. (*See*. Albert Ex. 26, p. 9, which shows the total estimated costs of operations for first three months incorrectly at "$33,900.")

[8] When the $50.00 is added, the mathematically correct figure should be $140,450.

[9] As of October 1990, $70,000 remained on this line of credit.

[10] As of October 1990, $50,000 remained available on this line of credit.

[11] As of October 1990, Harvey Albert's net worth was $1,656,536.

[12] Salt City's March 29, 1990, amendment was accepted by *Order* of the Presiding Judge released April 27, 1990 (FCC 90M-828).

[13] Salt City had secured a second letter from another MESBIC.

[14] This was corrected to reflect that the stockholders note for $25,000 was to be delivered to Salt City, not MBIC. (Salt City Ex. 10.)

[15] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom.*; *Guiman* v. *Federal Communications Commission*, 297 F. 2d 782 (1961).

[16] DJ's requested that official notice be taken of the prime lending rate and computation of monthly payments under such rate, regarding a $100,000 loan and a $50,000 loan. (*See*, "Request for Official Notice" filed by D.J.'s Broadcasting Company on December 18, 1990.) This is not the type of matter of which official notice may be taken. In this case, the prime rate relied upon by DJ's is not the present prime rate, a rate which is subject to fluctuation up and down. Thus, the "Request for Official Notice" IS DENIED.

[17] The terms and conditions of the loan to Salt City may perhaps manifest the difficulty that minority broadcast applicants have in securing financing for start-up broadcast stations. The Commission long ago recognized this problem. *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978). *See also*, *Storer Broadcasting Company*, 70 FCC 2d 709 (1979).

[18] In *KIST Corp.*, 99 FCC 2d 173, 181 (paragraph 10) (1984), the Review Board opined that the "letter may have been more of an accommodation . . " No such question is presented here.

[19] On June 17, 1991, D.J.'s Broadcasting Company (DJ's) filed a "Motion to Dismiss, or For Other Appropriate Relief." This motion was opposed by Marc Albert on July 2, 1991, and DJ's filed a reply on July 11, 1991. In its motion, DJ's accuses Albert of engaging in an *ex parte* contact as a result of a letter written by Albert's father to a Congressman, which letter was forwarded to the Commission. Also, DJ's relies on a letter written by Marc Albert to the Commission regarding his legal representation in this proceeding. A real party-in-interest issue is also sought, but the Presiding Judge previously declined to specify such an issue, and DJ's has presented nothing to warrant such issue.

The allegations do not warrant the dismissal of Albert's application, because DJ's has failed to articulate a proper legal basis for such action. However, there would appear to be a basis for the specification of issues to inquire into a possible violation of the Commission's *ex parte* rules. But, because Albert's application has already been denied under basic issues and, further, because Albert would not in any event prevail under the comparative issue, no useful purpose would be served by further enlarging the issues again thereby still further delaying the resolution of this proceeding.

[20] Salt City is a two-tier corporation, but there is no evidence whatsoever that the passive investors have been active in any way, shape, or form in the creation of Salt City or the prosecution of the application. Charles has been the only individual involved in controlling and managing the affairs of Salt City and will continue to be the sole controlling principal in the future.

[21] Salt City would be the clearly preferred applicant even if compared with Albert under the comparative issue. Specifically, if Albert's 100 percent integration proposal was compared to Salt City's 100 percent integration proposal, the qualitative factors relating to Salt City are clearly greater than the qualitative factors relating to Albert.

[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-3 File No. 10570-CL-P-599-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A
in Market No. 599, Oklahoma 4 - Nowata

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1991; Released: December 5, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration filed by Progressive Cellular III B-3 (Progressive) in the matter of *Progressive Cellular III B-3*, 6 FCC Rcd 596 (Mob. Serv. Div. 1991) (*Order*).[1] For the reasons discussed below, we deny Progressive's petition.

II. BACKGROUND

2. Progressive's application was tentatively selected as the non-wireline winner of a lottery held on August 9, 1989, for the Nowata, Oklahoma rural service area (RSA). Jackson Cellular Partnership (Jackson) filed a petition to deny, alleging that Progressive had violated Section 22.921(b)(1) of the Commission's rules, which prohibits an applicant from having an interest in more than one application for the same RSA. The Mobile Services Division (MSD) determined that Progressive had an ownership interest in Rubana Cellular Co. South Central (Rubana), a mutually exclusive applicant for the Nowata RSA. The attributed ownership was by virtue of the membership of two of Progressive's partners, Dennis and Jack Thomas (the Thomases), in Advanced Cellular Company (Advanced), which was reported by Rubana in its Nowata application as one of that applicant's partners. Consequently, the MSD dismissed Progressive's application. *Order, supra*. Progressive now asks that the MSD's action be reconsidered and its application reinstated.

III. DISCUSSION

3. Progressive, reiterating its arguments before the MSD, states that the inclusion of the Thomases in Rubana's application was without their knowledge or consent, and that Advanced's managing partner, Milton E. Vaughn (Vaughn), exceeded the scope of his authority when he included them. Such authority, it adds, was subsequently disavowed.

4. Progressive submits that the MSD's decision stems from an imprecise and misdirected application of partnership law and the absence of proper analysis of the underlying facts. It points out that the stated rationale for dismissal of its application was that the actions of one partner bind all other partners in the partnership. While Progressive says it generally agrees that the contracts of a partner made within the general scope of the business of the partnership are binding and require no ratification by the partnership, this principle only applies to persons who have unwittingly relied on the apparent authority of the errant partner. In the instant matter, says Progressive, it demonstrated that the scope of Advanced's partnership agreement was limited to non-wireline metropolitan statistical area (MSA) cellular lotteries, not RSA lotteries. Moreover, says Progressive, Vaughn had no authority to bind Advanced absent a vote of its partners, and Rubana, whose managing partner is also Vaughn, was fully aware of the limitations placed on Vaughn's authority. Consequently, Progressive claims, the MSD's action ignored determinative facts and misapplied basic partnership law.

5. The language of Section 22.921 of the rules is unequivocal in its prohibition against any party holding any interest in two applications for the same RSA market.[2] The Commission offered no exemption for parties who are unwittingly bound by their partners, or for parties whose interests are "unknowingly colorably in technical violation of Rule 22.921." *See* Pet. for Recon. at p. iii. As the MSD correctly stated, because the Thomases were partners in Advanced, and Advanced was a partner in Rubana, Advanced's actions bound the Thomases through the Rubana filing. [3] Any claim the Thomases may have that Vaughn violated his delegated authority under this partnership agreement is more properly resolved in a judicial forum. *See, e.g., Sonderling Broadcasting Co.*, 46 Rad. Reg. 2nd (P&F) 890 (1979); *John R. Kingsbery*, 71 FCC 2nd 1173 (1979); *Rodney A. McDaniel*, 4 FCC Rcd 1736 (Com. Car. Bur. 1989).

6. To the extent Progressive is implicitly requesting waiver of Section 22.921, the record does not support its assertion that Advanced was barred from entering lotteries for the RSA markets. The purported res.riction against participation in RSA lotteries is not contained in Advanced's partnership agreement provided to the MSD. *See* Pet. for Recon., Exhibit 1. Nor can such a restriction reasonably be inferred from the conduct of the partnership's members. The record indicates that Vaughn formed Rubana for the purpose of applying for RSA cellular authorizations, but he first obtained the consent of most of the Advanced partners. While Vaughn was unable to locate the Thomases, none of the other Advanced partners voiced any concern that his proposal exceeded the partnership's mandate or that he was acting beyond the scope of his authority.

7. Similarly, the record also does not support Progressive's other assertion that Vaughn acted beyond the scope of his authority when he caused Advanced to become a partner of Rubana. Advanced's partnership agreement explicitly authorizes the managing partner to carry out the partnership's business of procuring licenses to operate cellular telephone facilities. Moreover, the managing partner's exercise of his authority does not require the unanimous consent of the remaining partners, as claimed by Progressive. What the partnership agreement does provide is that once the managing partner procures a license his function as license procurement agent ceases, and the

partnership as a whole will decide how and what business decisions are to be made in order to construct and operate the facilities that will utilize the newly acquired license. Meanwhile, the managing partner would continue coordinating the partnership's original business of procuring cellular telephone licenses. *Id.* at paras. 3 and 12. Consequently, the record demonstrates that Vaughn properly fulfilled his duties as managing partner of Advanced, namely, binding his partners to RSA applications. Accordingly, based on the record before us, we decline to grant a waiver. *See* 47 C.F.R. § 22.19.

IV. CONCLUSION

8. We cannot find that the MSD erred in its findings, or that it failed to interpret or apply any "determinative" facts or partnership law incorrectly. The MSD's decision to return both Progressive and Rubana's applications for violation of Section 22.921 was consistent with Commission rules and policy. In sum, we affirm the MDS's action taken in the *Order*.

V. ORDERING PARAGRAPH

9. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Progressive Cellular III B-3 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The subject petition for reconsideration has been referred to us by the Chief, Common Carrier Bureau, pursuant to 47 C.F.R. §§ 1.104(b), 1.106(1).

[2] Section 22.921(b)(1) provides, in pertinent part:

> For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent.

[3] The Thomases' retroactive withdrawal from Advanced cannot cure the defect in the application as filed. *See* Progressive Cellular III B-2, 5 FCC Rcd 2772 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-119

In the Matter of

Florida Public Safety Plan

ORDER

Adopted: November 25, 1991; Released: December 5, 1991

By the Chief, Land Mobile and Microwave Division and the Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Florida (Region 9) Public Safety Plan (Plan) on May 10, 1990, 5 FCC Rcd 3067 (1990).

2. By letter dated September 13, 1991, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments to correspond to its current database and update tables contained in the plan. The Commission placed the letter on Public Notice for comments, 56 FR 49183 (September 27, 1991), and received no comments.

3. We have reviewed the proposed amendment to the Region 9 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Florida (Region 9) IS AMENDED, as set forth in the Region's letter of September 13, 1991. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Will McGibbon
Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-332

In the Matter of

South Texas Phone, Inc.

ERRATUM

Released: December 5 , 1991

On November 8, 1991, the Common Carrier Bureau released an Order in this docket, *South Texas Phone, Inc.*, CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.). Paragraphs 14 and 15 of that Order should read as follows:

14. IT IS FURTHER ORDERED, that South Texas Phone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), South Texas Phone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-350

In re Applications of

ABACUS BROADCASTING CORP. File No. BRH-900530A2

For Renewal of License of
Station KJQN-FM (95.5 MHz),
Ogden, Utah

and

REES BROADCASTING, INC. File No. BPH-900904MM

For a Construction Permit
for a New FM Station on
95.5 MHz at Ogden, Utah

HEARING DESIGNATION ORDER

Adopted: November 25, 1991; Released: December 5, 1991

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of Abacus Broadcasting Corp. ("Abacus") for renewal of license of Station KJQN-FM, Ogden, Utah;[1] and (b) the application of Rees Broadcasting, Inc. ("Rees") for a construction permit for a new FM broadcast station at Ogden, Utah. The applications are mutually exclusive because Rees proposes to operate on 95.5 MHz, the frequency on which KJQN-FM presently operates. Also before the Commission is an informal objection to the renewal application, filed February 21, 1991, by Ryan Frenzel ("Frenzel"), a KJQN-FM listener.

2. Frenzel, on behalf of himself (and purportedly on behalf of other KJQN-FM listeners, none of whom is identified) asks the Commission to deny Abacus' renewal application because KJQN-FM announcers, during the past license term, allegedly have been verbally abusive, insulting, condescending and disrespectful to listeners who call the station on the station's on-air request line. Frenzel's informal objection will be denied. The Communications Act of 1934, as amended, authorizes the Commission to license broadcast stations and to regulate their operations to some extent. However, the First Amendment to the U.S. Constitution and § 326 of the Communications Act of 1934, as amended, prohibit the Commission from censoring broadcast material or interfering with the licensee's discretion in selecting and broadcasting particular programming.[2] Accordingly, even assuming, *arguendo*, that KJQN-FM's announcers were discourteous to members of the public who called the station, Frenzel's objection does not contain specific allegations of fact sufficient to show that a grant of the Abacus application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Moreover, Frenzel's letter does not present a substantial and material question of fact requiring the specification of issues against Abacus or the intervention by Frenzel in this proceeding. See Sections 309(d) and 309(e) of the Communications Act of 1934, as amended.

3. Rees proposes to mount its transmitting antenna on an existing tower. Rees indicates that the height of the tower is 104 meters above ground level and 1523 meters above mean sea level. However, records already on file with the Federal Aviation Administration ("FAA") and the Commission's Antenna Survey Branch list the height of the tower as 115.5 meters and 1539 meters, respectively. Because the tower on which Rees proposes to mount its antenna was previously authorized, the tower height discrepancies do not constitute tenderability or acceptability defects. See *FM Applications*, 58 RR 2d 166 (1985). However, Rees will be required to submit to the Presiding Judge, within 30 days of release of this Order, an amendment resolving the noted discrepancies. Also, an appropriate air hazard issue will be specified against Rees. The designation of an air hazard issue in this instance does not necessarily imply that the facility cannot be approved. The purpose of the issue is to notify all parties, including the FAA, of the discrepancies. In general, changes in tower heights or coordinates require the concurrence of the FAA before the Commission will issue a construction permit. The fact that the FAA has approved a structure which is taller than the one proposed by Rees does not eliminate the need for resolving the discrepancies because such a change, under some circumstances, may modify the painting and lighting requirements for the tower structure.

4. Under the rules, applicants must determine whether their proposals would have a significant impact on the environment. If an application is determined to be subject to environmental processing under § 1.1307 of the Commission's Rules, the applicant must then submit an Environmental Assessment ("EA") containing the information specified in § 1.1311 of the Commission's Rules. Section

[1] The renewal application originally was filed by Utah Broadcasting Corp., the previous licensee of KJQN-FM, after the Commission had granted the application for consent to the assignment of license to Abacus but before the transaction was consummated. After consummation, the renewal application was amended to specify Abacus as the licensee.

[2] Although, the broadcast of obscene, indecent, or profane language may be regulated, *see* Title 18 U.S.C. § 1464; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon. granted in part and denied in part, Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom., Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988), Frenzel does not claim that KJQN-FM has broadcast such material.

1.1307(b) states that an EA must be prepared if the proposed operation would cause workers or the general public to be exposed to levels of RF radiation in excess of certain standards.

5. Our engineering study reveals that the Abacus and Rees proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency ("RF") radiation, as outlined in OST Bulletin No. 65 (October 1985). Accordingly, because the proposals of Abacus and Rees may have a significant environmental impact as defined in § 1.1307, a contingent environmental issue will be specified against both applicants, and each will be required to submit an EA containing the information described in § 1.1311. Each EA shall also specify the total contribution of radiation from all RF sources on and in the immediate vicinity of their proposed towers (including Station KOOG-TV) and describe all steps taken to comply with OST Bulletin No. 65, including steps to protect workers and the general public. The EAs shall be filed with the Presiding Judge within 30 days of release of this Order, and copies of the EAs shall be served on the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with § 1.1308 of Commission's Rules. The comparative phase of this proceeding shall be allowed to commence before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom, Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Chief, Audio Services Division, determines, based on an analysis of each EA, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue as to that applicant shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. See § 1.1308(d) of the Commission's Rules.

6. Abacus and Rees requested leave to amend their respective applications on the dates shown below. Under § 1.65 of the Commission's Rules, the amendments will be accepted. However, no comparative advantage may accrue to the applicants.

Applicant	Amendment Date(s)
Abacus	March 20, 1991
Rees	June 17, 1991; July 8, 1991; July 24, 1991

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to § 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A COMPARATIVE PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine whether there is a reasonable possibility that the tower height and location proposed by Rees would constitute a hazard to air navigation.

(b) If a Final Environmental Statement is issued with respect to Abacus and/or Rees in which it is concluded that the proposed facilities are likely to have an adverse impact on the quality of the human environment, to determine whether the proposals of Abacus and/or Rees are consistent with the National Environmental Policy Act, as implemented by §§ 1.1301 - 1.1319 of the Commission's Rules.

(c) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

8. IT IS FURTHER ORDERED, That Rees SHALL FILE, within 30 days of release of this Order, an amendment resolving the tower height discrepancies noted in ¶ 3, above.

9. IT IS FURTHER ORDERED, That Abacus and Rees each SHALL FILE within 30 days of release of this Order, an Environmental Assessment, pursuant to ¶¶ 4 and 5, above.

10. IT IS FURTHER ORDERED, That Abacus and Rees SHALL SERVE on the Chief, Audio Services Division, within 30 days of release of this Order, a copy of its respective Environmental Assessment referenced in ¶ 9, above.

11. IT IS FURTHER ORDERED, That the informal objection, filed February 21, 1991, by Ryan Frenzel IS DENIED.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Abacus and Rees ARE GRANTED, and the amendments ARE ACCEPTED.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service SHALL BE ADDRESSED to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order also SHALL BE SERVED on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Abacus and Rees, pursuant to § 1.221(c) of the Commission's Rules, in person or by their respective attorneys, within 20 days of the release of this Order, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That Abacus and Rees, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice, as required by § 73.3549(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MISSOURI RSA NO. 7
LIMITED PARTNERSHIP
d/b/a MID-MISSOURI CELLULAR,
Complainant,

v. File No. E-91-38

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: November 27, 1991; Released: December 5, 1991

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. Complainant in the captioned proceeding, Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (Mid-Missouri), by Motion, has petitioned the Commission to dismiss its complaint with prejudice. Complainant indicates that this matter has been fully settled and compromised, and that no further proceedings are necessary.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that "Complainant's Motion to Dismiss with Prejudice" filed by Missouri RSA No. 7 Limited Partnership on November 26, 1991, IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

5. IT IS FURTHER ORDERED that the Motion for Immediate Interim Relief filed by Mid-Missouri IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IT&E OVERSEAS, INC.,
Complainant,

v. File No. E-91-107

PACIFIC CONNECTION, INC.,
Defendant.

ORDER

Adopted: November 26, 1991; Released: December 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. IT&E Overseas, Inc. (IT&E) filed the above-captioned complaint against Pacific Connection, Inc. (PCI) on July 15, 1991, alleging that PCI violated Section 214 of the Communications Act in connection with its use of its international communications circuits. On November 18, 1991, IT&E filed a motion to dismiss its complaint stating its belief that the intended purpose of its complaint has already been served and nothing would be gained by prosecuting the complaint further.

2. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority under 47 C.F.R. § 0.291, that the Motion to Dismiss the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-013-LA

Application for authority to participate in the launch of the INMARSAT-2 (F-3)

ORDER AND AUTHORIZATION

Adopted: November 22, 1991; Released: December 5, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-013-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987 and updated on October 29, 1991, for authority to participate in the launch and in-orbit testing of the modified INMARSAT-2 (F-3) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INMARSAT-2 (F-3) was shipped from the United Kingdom by air transport and arrived at the launch site in Kourou, French Guyana, and is scheduled to be launched on December 3, 1991, utilizing an Ariane commercial launch vehicle. This satellite will be drifted to its operating position of 178^0 East Longitude in the Pacific Ocean Region (POR). It is anticipated that the INMARSAT-2 (F-3) will be in service by December 31, 1991.

4. The estimated costs associated with the INMARSAT-2 (F-3) are as follows (all amounts in real year dollars):

BAe Contract (including delivery price, engineering changes and amendments, launch support and performance incentives)	$ 76.1 million
Ariane Launch Vehicle and Services	$ 40.8 million
Insurance	7.7 million
TOTAL INMARSAT	$124.6 million
TOTAL COMSAT (based on current ownership share of 24.9748%)	$ 30.6 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, application File No. CSS-87-013-LA is GRANTED and Comsat is AUTHORIZED to participate in the launch and test program of the INMARSAT-2 (F-3) satellite to be positioned at 178^0 East Longitude over the POR, subject to the following terms and conditions:

(a) This authorization is limited to the described testing program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INMARSAT-2 (F-3) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTRAL RADIO TELEGRAPH CO. File No. I-T-D-91-012

Application for authority to close public coast stations KIL 927, St. Clair, Michigan, KIL 923, Hessel, Michigan, and KIL 926, Harbor Beach, Michigan.

ORDER AND AUTHORIZATION

Adopted: November 26, 1991; Released: December 5, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by Central Radio Telegraph Co. (CRTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast stations KIL927, St. Clair, Michigan, KIL923, Hessel, Michigan and KIL926, Harbor Beach, Michigan. Station KIL927 provides radiotelephone service to commercial and pleasure boats on the upper St. Clair River. Station KIL923 provides radiotelephone service to commercial and pleasure boats on the northern part of Lake Huron and the lower St. Mary's River. Station KIL926 provides radiotelephone service to commercial and pleasure boats on the lower part of Lake Huron. The application was placed on public notice on August 21, 1991. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, CRTC states that traffic has been steadily decreasing at all three of the stations leading to losses at all three stations. The U.S. Coast Guard handles safety and distress traffic in all three areas. Station WLC Rogers City, Michigan offers single-side band radio coverage and the Port Huron Marine Operator offer VHF coverage in the area of KIL927. Stations WLC Channel 26 Sault Ste. Marie, Michigan and WLC channels 26 and 28 Rogers City, Michigan offer VHF coverage in the area of KIL923. The area of KIL926 is served via VHF Channel 26 Tawas City, Michigan and single-side band coverage offered by CRTC.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Stations KIL927, KIL923 and KIL926.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-012 IS GRANTED, and CRTC is authorized to discontinue service via its public coast stations KIL927, St. Clair, Michigan, KIL923 Hessel, Michigan, and KIL926, Harbor Beach, Michigan.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-191

Application for authority to acquire and operate facilities for direct service between the U.S. and Mauritius

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 26, 1991; Released: December 5, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Mauritius by American Telephone & Telegraph Co. (AT&T).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-191 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate eight IDR satellite circuits between the Coram, New York earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the Mauritius furnished by Overseas Telecommunications Services Co, Ltd. (OTS);

b. acquire and operate one Digital Circuit Multiplication System (DCMS) terminal, thereby deriving initially two additional satellite circuits, for service to Mauritius;

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and Mauritius and beyond.

3. IT IS FURTHER ORDERED that the Appendix to File No. I-T-C-90-018 (*See*, 5 FCC Rcd 748 (Com. Car. Bur. 1990)) is hereby revised to add Mauritius to the list of countries and to increase the blanket authorization by ten circuits, *i.e* 7,928 for 1991 and 8,643 for 1992.

4. IT IS FURTHER ORDERED that the Appendix to File No. I-T-C-91-115 (*See* 6 FCC Rcd 3646 (Com. Car. Bur. 1991)) is hereby revised to add Burkina Faso[1] and Mauritius to the list of countries and to increase both the number of systems using IDR/TDMA bearer facilities and the total number of DCMS Systems by one, *i.e* Totals: 185 IDR/TDMA and 307 DCMS.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Countries for which Additional DCMS Authority is Requested and Totals by Bearer Facility

American Samoa
Argentina
Aruba
Australia
Austria
Bahamas
Bahrain
Barbados
Belgium
Bermuda
Bolivia
Brazil
British Virgin Islands
Brunei
Bulgaria
Cape Verde
Cayman Islands
Chile
China
Costa Rica
Curacao
Cyprus
Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Fiji Islands
Finland
France
Germany
Greece
Guam
Guatemala
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Korea
Malaysia
Malta
Marshall Islands
Micronesia
Montserrat
Netherlands
Netherlands Antilles
New Caledonia
New Zealand
Nicaragua
Nigeria
Norway
Pakistan
Panama
Papua New Guinea
Philippines
Poland
Portugal
St. Lucia
Saipan
Saudi Arabia
Singapore
South Africa
Spain
Sweden
Switzerland
Tahiti
Taiwan
Thailand
Tonga
Tortola
Trinidad
Turkey
Turks & Caicos
United Arab Emirates
United Kingdom
U.S.S.R.
Venezuela
Western Samoa
Yugoslavia
Kuwait
Burkina Faso
Mauritius

	IDR/ TDMA	TAT-8	HAW-4/ TPC-3	TCS-1	PTAT	TAT-9
Totals	185	53	16	18	13	22

Total
307

FOOTNOTE

[1] Application File No. I-T-C-91-104 was granted in May 1991 under, Section 63.03.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-D-91-014

Application for authority to discontinue operation of the Florida-Jamaica cable system and to modify the cable landing license.

ORDER AND AUTHORIZATION

Adopted: November 26, 1991; Released: December 5, 1991

By the Chief, International Facilities Division:

1. The above-captioned uncontested application filed on September 5, 1991 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to deactivate and retire the Florida-Jamaica cable and to modify the submarine cable landing license accordingly. The application was placed on public notice on September 18, 1991. No comments were received.

2. The Florida-Jamaica cable extends from Florida City, Florida to Kingston, Jamaica. Authority to construct and operate the system was granted by Order and Authorization released on March 8, 1961,[1] and the system was placed for service on February 19, 1993. The system currently has a voice-grade capacity of 230 circuits, and is jointly owned by AT&T and Jamaica International Telecommunications Limited of Jamaica. AT&T proposes to deactivate and retire the cable because of its age (28 years), high maintenance costs, (approximately $380,000 annually), and its obsolescent analog technology. The Florida-Jamaica circuit capacity will be replaced by the digital fiber optic TCS-1 Cable, which was placed in service on June 4, 1990,[2] and which has an initial capacity of 1260 64-Kbps circuits between the U.S. and Jamaica.

3. Upon review of the application, we find that the Florida-Jamaica cable has reached the end of its useful service life and upon deactivation of this cable, all services will be transferred to TCS-1 cable. Thus there will be no impairment of service to any community or part of a community formerly served by the Florida-Jamaica cable as a result of its retirement.

4. In view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the deactivation and retirement of the Florida-Jamaica cable.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-014 IS GRANTED, and AT&T is authorized to discontinue operation of and retire the Florida-Jamaica cable.

6. Within 60 days after the release of this order, the applicant shall notify the Commission of the accounting treatment it intends to use in retiring the Florida-Jamaica cable.

7. Upon discontinuance of use and operation of the Florida-Jamaica cable, the applicant shall notify the Commission thereof and submit to the Commission for cancellation of the cable landing license, S-C-L-21.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Florida-Jamaica Order and Certificate*, File No. P-C-4731.

[2] *American Telephone & Telegraph Company*, 3 FCC Rcd 6073 (Com. Car. Bur. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-206

Application for authority to make available facilities in the Transcaribbean Cable to INTEL for service to Panama

Application for authority to make available facilities in the Transcaribbean Cable to TRT/FTC Communications, Inc. File No. I-T-C-91-207

ORDER AND AUTHORIZATION

Adopted: November 26, 1991; Released: December 5, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-206 and I-T-C-91-207 ARE GRANTED, and AT&T is authorized to:

a. convey to its correspondent in Panama, Instituto Nacional De Telecommunicaciones (INTEL), on a lease basis, half-interests in AT&T wholly-owned 144 64-Kbps circuits in Segments F (Florida - Puerto Rico), G1 (Puerto Rico - Branching Unit), G2 (Branching Unit - Dominican Republic) and G3 (Dominican Republic-Jamaica) of the Transcaribbean Cable (TCS-1) to replace the existing capacity on the Florida-Jamaica cable for the provision of telecommunications services between the U.S. and Panama; and

b. make available to TRT/FTC Communications, Inc., on an Indefeasible Right of User (IRU) basis, a one-half interest in 30 MAUO's in Segments F, G1 and G4 (Branching Unit - Colombia) of TCS-1 until December 31, 1994 at which time AT&T will reacquire the said interests at net book cost.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the Authorized
Rate of Return for Interstate
Services of Local Exchange
Carriers

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1991; Released: December 6, 1991

By the Commission:

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I. INTRODUCTION

1. On September 19, 1990, this Commission prescribed an authorized rate of return on investment for local exchange carrier (LEC) interstate access of 11.25%.[1] On January 16, 1991, five parties filed petitions for reconsideration of the *1990 Represcription Order*.[2] Four petitioners seek reconsideration of the authorized rate of return, claiming it is too low.[3] U S West seeks clarification of the relationship between the rate of return and the lawfulness of earnings under price cap regulation.[4] After consideration of all relevant evidence submitted,[5] we find petitioners present no persuasive evidence that would lead us to reconsider our authorized rate of return determination, and deny the petitions for reconsideration on this issue. We grant U S West's petition to the extent it seeks clarification of the rate of return/price cap regulation relationship.

II. BACKGROUND

2. In the *1990 Represcription Order*, we prescribed an authorized, overall rate of return on investment for LEC interstate access services of 11.25%.[6] We determined that a reasonable range of cost of equity estimates for interstate access was 12.5%-13.5%.[7] We also determined that the cost of debt was 8.8%. Using the composite cost of debt and capital structure of the Regional Bell Holding Companies (RHCs), we found the capital structure to be 44.2% debt and 55.8% equity.[8] Based on our cost of equity, cost of debt, and capital structure findings, we calculated a "range of reasonable estimates of the interstate access cost of capital of 10.85%-11.4%."[9] Out of concern for infrastructure development, we prescribed a return in the upper part of this range: 11.25%.

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[1] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 7507 (1990) (*1990 Represcription Order*), *petitions for review docketed sub nom.*, Illinois Bell Telephone Co., *et al.* v. FCC, No. 91-1020 (D.C. Cir. filed January 11, 1991).

[2] The five petitioners are The Bell Atlantic Telephone Companies (Bell Atlantic), The Southern New England Telephone Company (SNET), Southwestern Bell Telephone Company (SWB), the United States Telephone Association (USTA), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, now U S West Communications (U S West).

[3] The parties seek authorized rates of return of 12.4% (Bell Atlantic); 12% (SNET); 12.5% (SWB); and 12. (USTA).

[4] U S West also raises the issue of using the capital structure of the Bell Operating Companies (BOCs) instead of the Regional Bell Holding Companies for setting the authorized rate of return. We will consider this issue along with similar ones raised by other petitioners.

[5] Comments were filed on March 28, 1991; Reply comments filed on April 11, 1991. Consumer Coalition filed an additional pleading on April 10, 1991, addressing issues raised by certain commenters. A complete list of all parties to this proceeding can be found in Appendix A.

[6] *1990 Represcription Order*, 5 FCC Rcd at 7507, para. 1.

[7] *Id.* at 7508, para. 9.

[8] *Id.* at 7507, para. 8.

[9] *Id.* at 7508, para. 12.

3. In reaching these results, we used the RHCs as surrogates for interstate access service. We accorded the most weight to a series of monthly discounted cash flow (DCF) estimates[10] of RHC costs of equity for the period January 1990-July 1990.[11] These DCF estimates were adjusted upward for the possibility that the growth estimate used in our DCF formula might somewhat understate investor expectations about the RHCs' cellular properties during the January-July period, and thus understate RHC costs of equity. We also found that the "RHC cost of equity [was] probably higher than the cost of equity for interstate access service due to the participation of RHCs in riskier nonregulated activities,"[12] and accordingly, made a downward adjustment to the cost of equity estimates.[13] Although parties submitted a variety of other cost of equity estimates based on a variety of other surrogates and methodologies, we found them unpersuasive. On reconsideration, carriers challenge a number of the determinations we made in reaching these conclusions. We address each of their arguments below.

III. DISCUSSION

A. DCF Issues

1. Flotation Costs

4. In the *1990 Represcription Order,* we rejected parties' requests to adjust DCF calculations for flotation costs generally,[14] and stated that no carrier specifically demonstrated a need to recover actual flotation costs. [15] Bell Atlantic reiterates the same request on reconsideration. Bell Atlantic also argues that the Commission's statement in the *1990 Represcription Order* that the Commission's current flotation cost treatment has had no negative impact on carriers' stock prices fails to consider that the RHCs' current market-to-book ratios "indicate nothing about the adequacy of past Commission return authorizations" for recovering flotation costs.[16]

5. Bell Atlantic's arguments are identical to those made in the *1990 Represcription Order* and in CC Docket 84-800. We have repeatedly considered and rejected this position,[17] and accordingly, we will not adjust for flotation costs. We also addressed Bell Atlantic's concern over unrecovered past flotation costs in the *1990 Represcription Order.* As we stated there," [T]here is no evidence... that past costs remain unrecovered." [18] Moreover, the carriers were not issuing stock at that time. Thus, the carriers have not been able to satisfy our requirement for recovery of flotation costs: that they demonstrate the need to recover actual costs, not merely rely on general assertions.[19]

2. Quarterly Compounding

6. In the *1990 Represcription Order,* we found unpersuasive arguments favoring the use of a quarterly compounded dividend in the DCF. We also noted that the Commission fully considered and rejected the same arguments for quarterly compounding in CC Docket 84-800.[20] On reconsideration, Bell Atlantic again argues for a quarterly compounded dividend; we again find these arguments unpersuasive. Moreover, the computational difference is minor.[21] Thus, we find no reason to reconsider our decision not to use a quarterly compounded dividend.

3. The "Portfolio Effect"

7. In the *1990 Represcription Order,* Bell Atlantic argued that the RHCs were inappropriate surrogates for interstate access service because RHC diversification created a "portfolio effect." The "portfolio effect" theorizes that, by including assets whose returns are less than perfectly correlated in investment portfolios, investors reduce the variability in their overall portfolio return. Thus, Bell Atlantic concluded that RHC diversification made the risk of the RHC lower than its LECs. We specifically rejected this argument, finding that Bell Atlantic had "not demonstrated the existence of a portfolio effect that would cause RHC risk to be lower than LEC interstate access risk."[22] On reconsideration, Bell Atlantic reiterates its portfolio effect argument.[23] Consumer Coalition maintains that there is no portfolio effect, but states that, if there were a portfolio effect, Bell Atlantic has failed to quantify its magnitude.[24]

8. We carefully considered and rejected Bell Atlantic's portfolio effect argument in the *1990 Represcription Order.*[25] We do not dispute that some portfolio effect lowers the RHC cost of equity below the cost of equity for its riskiest nonregulated operations. We continue to find it

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[10] The DCF formula is defined as Ke = D/P + G, where Ke = cost of equity; D = the expected annual dividend for the next year; P = current share price; D/P = current dividend yield; and G = currently-expected long-term growth rate of dividends.

[11] *1990 Represcription Order,* 5 FCC Rcd at 7508, para. 12.

[12] *Id.* at 7508, para. 9.

[13] Cost of equity findings contained in recent state public utility commissions' proceedings and equity market benchmarks derived from DCF estimates for the S&P Industrials and electric utilities corroborated our cost of equity determinations. *Id.* at 7508, para. 10.

[14] *Id.* at 7516, para. 75. Flotation costs are costs companies incur when they issue stock. The costs are direct, out-of-pocket expenses for getting shares into the hands of investors, and indirect, the temporary reduction in market value of the stock due to the issuance of additional shares.

[15] *1990 Represcription Order,* 5 FCC Rcd at 7510, para. 75. *See also,* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, FCC 85-645, 51 Fed. Reg. 1795, para. 43 (Jan. 15, 1986) (*84-800 Phase II Order), recon.* 104 FCC 2d 1404, 1432, para. 62 (1986) (*84-800 Phase II Recon. Order).*

[16] Bell Atlantic Petition at 14.

[17] *1990 Represcription Order,* 5 FCC Rcd at 7516, para. 75; *84-800 Phase II Order,* at para. 43; *84-800 Phase II Recon. Order,* 104 FCC 2d at 1432, para. 62.

[18] *1990 Represcription Order,* 5 FCC Rcd at 7516, para. 75.

[19] *1990 Represcription Order,* 5 FCC Rcd at 7516, para. 75, *citing, 84-800 Phase II Reconsideration,* 104 FCC 2d at 1432, para. 62.

[20] *1990 Represcription Order,* 5 FCC Rcd at 7515, para. 72; *84-800 Phase II Recon. Order,* 104 FCC 2d at 1430-1431, paras. 57-58.

[21] *1990 Represcription Order,* 5 FCC Rcd at 7517, para. 72 ("the difference in computations is minor -- too minor, in our view, to attempt to codify a theoretical, complex adjustment that is disputed by the experts.").

[22] *Id.* at 7517, para. 85.

[23] Bell Atlantic Petition at 5-7.

[24] Consumer Coalition Opposition to Petitions at 7.

[25] *1990 Represcription Order,* 5 FCC Rcd at 7517, paras. 84-85.

highly unlikely, however, that diversification into foreign, and nonregulated, competitive operations could lower the business risk for an RHC as a whole below the business risk of its relatively low-risk regulated telephone business. Bell Atlantic offers no persuasive evidence on reconsideration which leads us to revisit the issue.[26]

4. The "Cellular Phenomenon"

9. Some parties in the *1990 Represcription Order* argued that any use of RHC data in a DCF formula would be inappropriate because of the "cellular phenomenon." They posited that the "cellular phenomenon" would cause any DCF calculation performed using RHC data to significantly understate the cost of capital for the RHC because the RHC growth rates then available did not adequately account for investor expectations about the RHCs' cellular properties. After examining analysts' reports on the record, we agreed that RHC cost of equity measurements made using our DCF formula could be understated because RHC stock prices could reflect investor growth expectations somewhat in excess of the Institutional Brokers Estimate System (IBES) median growth estimates that we used in our formula.[27] However, we determined that it was possible to adjust the DCF estimates by adjusting the growth estimates for cellular effects. We accepted as most credible the partially adjusted DCF estimates produced by Consumer Coalition's witness, Miller. Because Miller's estimates did not account for cellular growth reflected in the IBES estimate, we further adjusted Miller's cost of equity estimates. We concluded that the cellular effect "may cause the DCF estimates for the RHCs to be understated by 75-100 basis points at the very most."[28]

a. Bell Atlantic's Position

10. Bell Atlantic again asserts that the cellular phenomenon impacts on RHC data so much that DCF estimates based on RHC data are meaningless. Alternatively, Bell Atlantic argues that, if the Commission continues to use the RHCs as surrogates, it must make a greater adjustment to DCF calculations for cellular effects.[29] Consumer Coalition reiterates its position that no cellular phenomenon exists. However, Consumer Coalition claims that, if a cellular phenomenon exists, the Commission adequately adjusted cost of equity estimates for it.[30]

11. We remain convinced that adequately adjusted DCF estimates produce meaningful cost of equity estimates for the RHCs. The DCF formula posits that yield plus long-term expected growth equals the cost of equity. Although LECs have attempted throughout this proceeding to characterize the cellular effect as some highly unusual phenomenon that destroys the usefulness of the formula, all their arguments reduce to something considerably less exotic: a dispute over whether a particular long-term growth estimate, the IBES estimate, was appropriate for use as an input to the formula during the period January-July 1990. Viewed in this way, the cellular phenomenon does not require us to discard the DCF formula, but merely to adjust the formula inputs to remove the effects of cellular.[31] Bell Atlantic provides no persuasive arguments on reconsideration which dissuade us of this view.

12. Bell Atlantic also has not shown why we must further adjust upward our DCF estimates. Of the parties to the represcription proceeding who supported Bell Atlantic's position, only one, Pactel, made any attempt to quantify the alleged cellular effect. In the *1990 Represcription Order,* we carefully reviewed Pactel's DCF adjusted estimates, as well as that offered by the Consumer Coalition's expert, Miller, and we found Miller's to be the most credible.[32] However, because record evidence indicated that IBES estimates did "incorporate at least some element of expected growth from cellular,"[33] we concluded that Miller's adjusted cost of equity estimates needed to be reduced to account for cellular growth reflected in the IBES estimate. We determined that one third to one half of the growth attributable to cellular effects was in the IBES estimates, and adjusted accordingly.[34] Bell Atlantic provides no new evidence either to refute the reasonableness of our adjustment or to demonstrate that we were wrong in concluding that the other adjustments offered in the record produced implausible results.[35]

b. GTE's Position

13. On reconsideration, GTE posits that our treatment of the growth component in the DCF formula is inconsistent with the use of the DCF methodology.[36] Essentially, GTE's position is that the DCF's underlying premise, the efficient market hypothesis (EMH), holds that all available and relevant information about a company is incorporated into the market price of that company. Thus, adjustment of the DCF costs of equity for a growth component which does not reflect fully investor expectations about cellular growth is inconsistent with the EMH. GTE cites a recent case, *Tennessee Gas Pipeline Co. v. FERC,*[37] to support its position.

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[26] Bell Atlantic, also took issue with our statement that "there is little evidence that conglomerates enjoy lower costs of capital than other, less diversified companies." *Id.* at 7517, para. 85. We agree that the record does not speak to costs of capital for conglomerates versus costs of capital for a single line of business. However, the absence of such evidence does not affect our conclusion that Bell Atlantic has not proven its portfolio effect.

[27] *Id.* at 7519, para. 100.

[28] *Id.* at 7519, para. 102.

[29] Bell Atlantic Petition at 8.

[30] Consumer Coalition Opposition to Petitions at 10.

[31] *1990 Represcription Order,* 5 FCC Rcd at 7519, para. 100.

[32] *Id.* at 7519, para. 102.

[33] *Id.* at 7518, para. 98.

[34] *Id.* at 7519, para. 102.

[35] SWB argues that the Commission's determination to make an upward adjustment to the IBES "g" estimate used in its classic DCF and its reliance on equity market benchmarks as support for that adjustment actually constitutes a finding that classic DCF results are unreasonable. SWB Petition at 4, *citing 1990 Represcription Order,* 5 FCC Rcd at 7528, paras. 183 and 184. Contrary to SWB's contention, our careful consideration of whether the IBES "g" was reflective of the full range of investor expectations about cellular does not mean that we have lost confidence in either the DCF formula or the efficient market hypothesis.

[36] GTE Reply at 2.

[37] Tennessee Gas Pipeline Co. v. FERC, 926 F.2d 1206 (D.C. Cir. 1991) (*Tennessee Gas*).

14. The adjustment that we made was entirely consistent with the EMH. The IBES growth estimate is but one of many possible sources for the growth term of the DCF formula. In the *84-800 Phase II Recon. Order,* we adopted the IBES estimate as the best available growth source because it contains a number of expert estimates and is widely followed by investors.[38] However, use of this particular growth forecast is not required by DCF theory or the EMH. What is required is that the growth rate used in the formula be one that reflects the thinking of investors in developing their expectations about growth in dividends.[39] When we applied a 75-100 basis point upward adjustment to the results of our DCF formula, we were adding those 75-100 basis points to the IBES growth estimates in order to better reflect investors' thinking. Making such an adjustment in no way denies the principle that all relevant information is incorporated into the price of the stock.

15. GTE's reliance on *Tennessee Gas* is inapposite. At issue in *Tennessee Gas* was FERC's adjustment of a DCF cost of equity result because it found that a decline in interest rates was not fully reflected in Tennessee Gas's dividend yield, *i.e.,* interest rates fell, but the dividend yield remained constant. As the court phrased it, FERC assumed that "investors are not able to account fully for the effects of a decline in interest rates on their investment alternatives until some six months or more after those rates are published."[40] Because the EMH is the underpinning of the DCF approach, the court found an adjustment for an alleged time lag unacceptable.[41] FERC's adjustment in *Tennessee Gas* directly contradicted the EMH. Our cellular adjustment, by contrast, assumed that RHC stock prices did in fact incorporate all cellular expectations. The holding in *Tennessee Gas* does not, therefore, support or require reconsideration of our cellular adjustment. Unlike FERC in that case, we did not adjust the end result of the DCF analysis. Rather, we simply adjusted one of the DCF inputs in order to ensure that DCF achieves its purpose of accurately reflecting marketplace conditions.

5. Market-to-Book Ratio

16. In the *1990 Represcription Order,* we stated:

> [M]arket-to-book ratios greater than one have been viewed traditionally as possible indicators that the company's return is greater than its required return. The high market-to-book ratios that the RHCs enjoy today are probably related to their nonregulated activities and tell us little about the required return on interstate access services.[42]

Bell Atlantic and USTA argue that if this statement is true, then it must also be true that DCF results based on RHC prices also tell little about the required return on interstate access service.[43] Thus, the Commission must consider other surrogates which more accurately reflect the interstate access industry.

17. We disagree that our statement about market-to-book ratios undercuts our reliance on the RHCs as surrogates for interstate access. Our statement about market-to-book ratios merely recognized that, due to a number of factors, we do not take the regulatory approach of seeking a rate of return that would produce a market to book ratio of one. In the *1990 Represcription Order,* we acknowledged that the RHCs were more diverse today than they were in 1986, but found that they remained adequate surrogates for interstate access because "[o]ver 80% of total RHC revenues still come from regulated operations."[44] Our observation that some of the stock value reflected in RHC market-to-book ratios was "probably related" to diversified activities is entirely consistent with that determination.

6. RHCs' mix of regulated and nonregulated operations

18. In paragraph 86 of the *1990 Represcription Order,* we ascertained from the record that "the RHCs are also involved in activities which are perceived as riskier than their regulated telephone business."[45] From this we concluded that the RHCs' cost of capital as a whole will somewhat overstate the cost of capital for interstate access. On reconsideration, BellSouth argues that our reasoning for this conclusion is circular and unexplained because the footnote reference at the end of paragraph 86, footnote 132, leads only to a restatement of the same conclusion in a later section of the *1990 Represcription Order.*[46]

19. Paragraph 86 appears at the end of our discussion of the LEC arguments concerning the alleged portfolio effect (see paras. 7-8, above). LECs offered evidence about RHC diversification with the intention of demonstrating that overall RHC costs of equity were lower than the interstate access costs of equity. We drew from their evidence, and from arguments and evidence offered by opposing parties, the opposite conclusion: that cost of equity estimates for an RHC would be higher than the cost of equity for interstate access alone. The conclusions contained in paragraph 86 were based on showings described in paragraphs 77-82, and not on anything found in the text cross-referenced in the footnote at the end of paragraph 86.

7. Avera-Fairchild correlation study

20. SWB argues that, in the *1990 Represcription Order,* the Commission ignored a study submitted by SWB which allegedly demonstrates that the DCF produces unreasonable results.[47] The study presented by SWB experts, Avera

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[38] *84-800 Phase II Recon. Order,* 104 FCC 2d at 1428-1429, paras. 52-56.

[39] *See* Bonbright, James C., Albert L. Danielsen, and David R. Kamerschen, *Principles of Public Utility Rates,* 2nd Edition, 319 (1988).

[40] *Tennessee Gas,* 926 F.2d at 1209.

[41] *Id.*

[42] *1990 Represcription Order,* 5 FCC Rcd at 7520, para. 115. We made this statement in the course of addressing, and rejecting several arguments predicated on the assumption that our rate of return prescription should preserve existing market-to-book ratios. *Id.*

[43] Bell Atlantic Petition at 3; USTA Petition at 16; BellSouth Reply at 8-9.

[44] *1990 Represcription Order,* 5 FCC Rcd at 7517, para. 83.

[45] *Id.* at 7517, para. 86.

[46] BellSouth Reply at 3-5.

[47] SWB Petition at 5, *citing* SWB Rebuttal Submission in the *1990 Represcription Order,* Joint Affidavit of William Avera and

and Fairchild, calculated correlation coefficients between five types of data characterized as risk indicators, and the classic DCF costs of equity for electric utilities for the years 1977-1989. The risk indicators they used were: Moody's bond rating, S&P bond rating, Value Line financial strength indicator, Value Line safety ranking, and Value Line beta. Avera and Fairchild claim that the results show a strong, positive relationship between these risk indicators and the costs of equity for the years 1977 to 1987. However, they assert, beginning in 1988, this relationship became negative. They concluded that the change in the relationship proves that the DCF fails fundamental tests of reasonableness.[48]

21. Consumer Coalition states that the Avera-Fairchild correlation study does not explain why the DCF became invalid for all public utilities in 1988. Consumer Coalition argued: (1) none of the correlations in the study are statistically significant; (2) four of the five risk criteria correlated with the DCF results are discrete ordinal ratings, making them unsuitable for correlation studies; and (3) the risk indicators used in the study are not valid.[49]

22. After careful reexamination of the Avera-Fairchild study, we conclude that the study proves nothing about whether the DCF method produces reliable and reasonable results. Avera-Fairchild claim to have identified five risk indicators that used to correlate positively with DCF results for electric utilities, but which now show negative correlation with DCF results for electric utilities. This claim is not supported by their study. In fact, three of their five indicators actually showed no relationship most of the time from 1977-1987, and only one showed a positive correlation more years than not.[50] None of their risk indicators had a statistically significant correlation with the DCF costs of equity, negative or positive, in 1977, 1980, 1988 or 1989. Since the study did not show a relationship between DCF costs of equity for electric utilities and the selected risk indicators, no conclusion can be drawn from it.

23. Moreover, SWB fails to explain why there should be a relationship between cost of equity results and the risk indicators used by Avera-Fairchild. For example, bond ratings, which focus on the potential for recovery of principle and interest by bondholders, have little to do with equity holders' expectations about future profitability and risk. Companies with high bond ratings may have either high or low costs of equity. Beta is an indicator of risk based on historical measures of the volatility of a stock relative to the equity market as a whole. A company whose beta has risen may well experience a decline in its cost of equity if capital costs in general decline. Thus, we find that the Avera-Fairchild study fails to prove that the classic DCF no longer produces reliable, reasonable results.

B. Alternative Methodologies for Determining Costs of Equity

1. The Multi-Stage DCF

24. In the *1990 Represcription Order*, SWB argued for a more elaborate DCF model, one with intermediate and long term growth estimates, as an alternative to the classic DCF which uses only one long term estimate of growth. Using this model, SWB assumed that its earnings per share would grow at an 8.5% to 9% rate for 5 years, and then fall to a constant 5.12% growth rate for the next 15 years. It also assumed that price per share would grow 16.75% for 5 years, and then 9% for the next 15 years.[51] We rejected the model because the underlying assumptions of the model were implausible. We did not accept that "SWB's share price will grow twice as fast as its earnings for twenty years, or that SWB's shares will trade at 30 times earnings at the end of that period."[52]

25. On reconsideration, SWB contends that the Commission's position is that the multi-stage DCF formula is inadequate, and answers that the classic DCF is too simplistic in today's complex market. SWB argues that the Commission's criticism of its multi-stage DCF model's inputs is unwarranted because the price appreciation and price/earnings projections used by SWB in the multistage DCF are modest compared to the actual increases in these inputs since divestiture.[53] Consumer Coalition claims that SWB fails to present any evidence which the Commission has not already considered in regard to its multi-stage DCF. Consumer Coalition also contends that SWB's data on actual price appreciation and price/earnings are misleading.[54]

26. In theory, our classic DCF and the multi-stage DCF are both valid models. We do not reject the concept of the multi-stage DCF. However, in the *1990 Represcription Order* we rejected this particular multi-stage DCF because the underlying data was implausible. We continue to find SWB's price appreciation and price/earnings projections improbable. We do not believe that SWB's share price will grow twice as fast as its earnings for twenty years. Moreover, SWB "proof" of its actual increases in price and price/earnings ratio is not persuasive. The fact that SWB's stock price increased dramatically in a time of dramatic stock price increases in general does not give much weight to its argument that the stock will continue to increase at that rate.

2. SWB's Risk Premium Analyses

27. SWB states that the Commission also failed to discuss its other risk premium analyses presented in its Initial Submissions in the *1990 Represcription Order* proceeding.[55] SWB, through Avera and Fairchild (Avera-Fairchild), submitted alternative applications of the risk premium method to produce cost of equity estimates. In

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Bruce Fairchild, "Rejection of the Constant Growth DCF Model and Further Evidence Using Risk Premium Methods" (Avera-Fairchild study or Avera-Fairchild).

[48] Avera-Fairchild study at 5-6.

[49] Consumer Coalition Opposition to Petitions at 16-20. SWB offered a point by point rebuttal to these arguments in it Reply. SWB Reply at Appendix.

[50] Avera-Fairchild study at 5.

[51] *1990 Represcription Order*, 5 FCC Rcd at 7521, para. 121.

[52] *Id.* at 7521-7522, para. 124.

[53] SWB Petition at 11-13.

[54] Consumer Coalition maintains that "stock price growth... outpac[ing] earnings growth starting from zero several years ago does not make more credible the assumption that stock price can grow twice as fast as earnings over 20 years." Consumer Coalition Opposition to Petitions at 21.

[55] SWB Petition at 16-17, *citing* SWB Initial Submission, Joint Affidavit of Avera and Fairchild.

these risk premium analyses, Avera-Fairchild attempted to estimate the cost of equity by (1) examining the historical relationship of interest rates and risk premiums (which they posit is an inverse relationship) as presented in several academic studies, (2) using the relationship they found to develop a risk premium based upon current interest rates, and (3) applying that risk premium to current interest rates to produce cost of equity estimates.[56]

28. We find fault with Avera-Fairchild's estimates because the academic studies used to determine the relationship of interest rates and risk premiums do not support Avera-Fairchild's hypothesis. Two studies they cite contain evidence that contradicts their hypothesis. One of the academic studies states that "[u]sing two models which assume alternative expectations about the outcomes of rate of return regulation, we were unable to find a significant relationship between risk premiums and interest rates."[57] Another study[58] concluded that in one period there was a negatively correlated relationship, and in another, a positively correlated relationship. We reject the Avera-Fairchild results because the underlying studies do not support their conclusions.

3. Capital Asset Pricing Model (CAPM)

29. In the *1990 Represcription Order*, we examined and rejected the CAPM studies submitted. Although we held that the CAPM approach has potential for providing estimates of the cost of equity capital with the same reliability as the DCF approach, we found that the CAPM studies submitted were suspect because of the "unrealistically high betas and risk premiums."[59] Moreover, we concluded that the LECs' risk premiums were higher than those used by many of the analysts' reports in the record. We also held that "[w]hile such adjusted betas [Value Line betas] undoubtedly have their uses, we do not believe use of an adjusted beta is consistent with the theory of CAPM."[60]

30. SWB takes issue with the Commission's criticism of the Value Line betas used in the CAPM studies. USTA claims that the Value Line betas should be accepted because they are adjusted by a method which transforms them into "forward-looking" values; this is the same standard the Commission used in picking the growth input for its DCF formula. Also, SWB claims that the Commission offered no basis for holding that the risk premiums used in the rejected CAPM studies were inflated.[61]

31. Consumer Coalition argues that SWB fails to recognize that the Value "Line betas are "out of line with the rest of the investment community."[62] Moreover, Consumer Coalition claims that USTA's attempt to compare Value Line betas with IBES growth estimates is irrelevant because the IBES estimate's value is its representative nature. Consumer Coalition also states that the risk premiums used by LECs are not used by Wall Street; Wall Street uses lower risk premiums. Thus, because this proceeding is to ascertain "real-world" investors' required equity returns, the risk premiums that matter are risk premiums used by investment advisors.[63]

32. We addressed and rejected SWB's argument about Value Line betas in the *1990 Represcription Order* proceeding.[64] We also reject USTA's contention that the Value Line adjustment produces "forward-looking" betas. The adjustment that Value Line applies to beta does not produce an appropriate forward-looking (expected or anticipated) beta for any particular company; it is simply based on a mechanical formula which adjusts low betas upward and high betas downward.[65] Unadjusted utility betas tend to be less than one, so Value Line adjusts them upward; this is why Value Line betas are always higher than other published betas for utility stocks.

33. We continue to view the risk premiums used in the risk premium studies on the record as excessive for the reasons stated in the *1990 Represcription Order*. First, we have never seen convincing evidence that investors in fact expect these risk premiums. Second, the record did provide us with evidence that investments analysts use much lower risk premiums in developing their investment recommendations.[66]

4. USTA Cluster Analysis

34. In the *1990 Represcription Order*, USTA used a cluster analysis to select a group of comparable firms for producing costs of equity for interstate access. Although we did not reject the concept of comparable firms analyses, in the *1990 Represcription Order*, we assigned no weight to the cost of equity results of USTA's cluster analysis. We found that USTA failed to demonstrate that its selection criteria for comparable firms "accurately "portray[ed] all the relevant dimensions of risk."[67] We also found that USTA's cluster group appeared to have diverse risks and costs of equity, and seemed noncomparable to the BOCs in both respects.

35. Bell Atlantic and USTA argue that the Commission did an "about-face" when it rejected USTA's cluster analysis.[68] Bell Atlantic and USTA also contend that the Commission's criticism of USTA's cluster analysis fails to define other "relevant risks" that the USTA study did not consider, and essentially requires using the test group

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56 SWB Petition at 18.

57 Carleton, *Inflation Risk and Regulatory Lag*, 38 Journal of Finance 419, 430 (May 1983).

58 Brigham, *The Risk Premium Approach to Measuring a Utility's Cost of Equity*, Financial Management 42 (Spring 1985).

59 *1990 Represcription Order*, 5 FCC Rcd at 7523, para. 139.

60 *Id.*

61 Bell Atlantic argues that the implied risk premium of the 1986 rate of return was over 6%, supporting risk premiums submitted in the *1990 Represcription Order* proceeding. Bell Atlantic Petition at 12, n.29.

62 Consumer Coalition Opposition to Petitions at 36.

63 *Id.* at 37.

64 *1990 Represcription Order*, 5 FCC Rcd at 7523, para. 139.

65 This adjustment is based on the premise that, in general, betas move over time towards one. This tendency was recognized in a 1971 article on risk. Blume, *On the Assessment of Risk*, 26 Journal of Finance 1 (March 1971).

66 *See, e.g.*, Duff & Phelps Inc., "Telephone Industry Special Report," January, 1990 at 7 (risk premium of 4.0); Goldman Sachs Strategy, Dividend Discount Model (risk premium of 2.0-5.0), Morgan Stanley Investment Research, "Telecommunications Services, Max Headroom: The Baby Bells Are Not All Alike," May 10, 1990 at 28 (risk premium of 5.4).

67 *1990 Represcription Order*, 5 FCC Rcd at 7526, para. 166.

68 Bell Atlantic Petition at 9; USTA Petition at 8-10.

firms as the comparable firms.[69] Moreover, Bell Atlantic and USTA claim that USTA's cluster analysis results supports the Commission's view that interstate access is less risky than the bulk of S&P 400.[70] Finally, Bell Atlantic argues that the Commission's statement that the cluster analysis selects for profitability is unsubstantiated.[71]

36. Consumer Coalition argues that the Commission did not do an "about-face"; it merely found this particular comparable firms analysis inadequate.[72] Consumer Coalition also states that, in this instance, the RHCs are the best proxies for interstate access, and therefore, it should be no surprise that the test group and the cluster group should be the same. Arguing that the Commission has no burden to prove what are relevant risks, Consumer Coalition goes on to claim that it pointed out the faults with USTA's risk indicators in its *1990 Represcription Order* proceeding submissions. Finally, Consumer Coalition contends that USTA's cluster analysis results were still higher than the midpoint of the second quartile of the S&P 400, the maximum benchmark for historical interstate costs of equity.[73]

37. Although we accept the concept of a comparable firms analysis, we found, and continue to find on reconsideration, the USTA study insufficient. In the past, we have found that if a technique produces a group of firms with widely-disparate costs of equity, that group was not likely to be comparable to interstate access service. In 1986, we found that our own comparable firms methodology produced costs of equity which varied widely.[74] As we stated there," [r]ather than presenting tightly compressed, homogeneous capital costs, which would be expected if the risks were truly similar, the "comparable firms" instead exhibited great variability."[75] USTA's method produced a group of firms whose DCF costs of equity ranged from 11.3% to 18.07%. This observation alone is sufficient reason to discount the validity of USTA's study, even if the Commission were to give weight to cluster analyses.[76] Finally, we note that we did not do an "about-face." It is true that we sought comment in Docket 87-463 on whether a cluster analysis would produce better comparable firms groups than the Part 65 screening methodology. However, we have never adopted any rules based on the proposals in that docket. We are not bound to accept uncritically the results from an application of our generally proposed, but unadopted, methodology. Thus, we decline to reconsider our *1990 Represcription Order* on the basis of these arguments.

C. Capital Structure

38. Part 65 calls for use of the composite capital structure of the RHCs to calculate an overall rate of return for interstate access services.[77] The record in the 1990 represcription proceeding showed the RHCs to have composite capital structure of 44.2% debt and 55.8% equity. LECs took the position that we should instead use the composite capital structure of the BOCs, which was 40.5% debt and 59.5% equity. We found that neither method was precisely accurate, that both methods were acceptable, and that both debt/equity ratios were reasonable for regulated telephone operations.[78] We chose to use the Part 65 method because we believed adoption of the BOC approach would create an undesirable incentive to manipulate BOC capital structures.

39. On reconsideration, the LECs and USTA again argue that only the regulated telephone companies' capital structures are relevant because the debt of nonregulated affiliates has no bearing on LEC capital requirements.[79] USTA also argues that the use of RHC capital structures not adjusted for the effect of nonregulated activities is inconsistent with the use of cost of equity "estimates adjusted for the effect of nonregulated activities.[80] Consumer Coalition claims that the capital structure of every entity owned by an RHC affects the capital costs of interstate access because the RHCs' capital structures affect financial risks which affect equity costs.[81] Consumer Coalition argues that USTA's argument is inapposite because cost of equity implicates business risks, capital structure implicates financial risks.[82]

40. The overall rate of return that we prescribe applies to the interstate access services of every LEC. Proportions of debt and equity that support interstate access vary greatly among the LECs. Whatever capital structure we adopt is, in essence, a hypothetical capital structure as to any particular LEC's interstate operations. What is essential for a hypothetical capital structure is that it be reasonable. We reaffirm our conclusion that a 44.2% debt/55.8% equity capital structure is well within the limits traditionally considered acceptable for regulated telephone operations,[83] and is, therefore, reasonable for purposes of calculating an industry-wide allowed rate of return for interstate access services.

41. We acknowledge, as we did in the *1990 Represcription Order*, that RHC capital structures reflect some debt attributable to nonregulated operations. How-

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[69] Bell Atlantic Petition at 9-10; USTA Petition at 14-15.

[70] The cluster analysis, using a classic DCF method, resulted in cost of equity estimate of 14.75%. This is less than the S&P 400 mean of 15.51%. Bell Atlantic Petition at 10-11; USTA Petition at 11-12. *See also* BellSouth Comments at 7.

[71] In the *1990 Represcription Order*, we merely stated: "[a] number of *parties* argue that USTA's selection criteria [for cluster companies]... select for high profits as much as low risk." (emphasis added) *1990 Represcription Order*, 5 FCC Rcd at 7526, para. 165.

[72] Consumer Coalition Opposition to Petitions at 25-27.

[73] *Id.* at 32.

[74] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32920, para. 22, (*1986 Represcription Proceeding*), *recon. den.* 2 FCC Rcd 5636 (1987).

[75] *See 1986 Represcription Proceeding*, at para. 22.

[76] *Id.* at para. 23.

[77] 47 C.F.R. § 65.300.

[78] *1990 Represcription Order*, 5 FCC Rcd at 7511, para. 34.

[79] *See* Bell Atlantic Petition at 14-15; USTA Petition at 20; U S West Petition at 11-12; BellSouth Comments at 10-11; GTE Comments at 15.

[80] USTA Petition at 18.

[81] Consumer Coalition Opposition to Petitions at 55.

[82] *Id.* at 60.

[83] *See, e.g.*, American Telephone & Telegraph Company, and the Associated Bell System Companies Charges for Interstate Telephone Service, Docket No. 19129, *Decision and Order*, 38 FCC 2d 213, 239 (1972), *affirmed sub nom.*, Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) ("we find no sound basis for us to conclude that we should use a debt ratio other than the debt ratio of 45% in our determination of the fair rate of return herein."); American Telephone & Telegraph Co., Charges for Interstate Telephone Service, Docket No. 20376, *Decision*, 57

ever, RHC capital structures do unquestionably include all of the debt that supports BOC regulated operations. By contrast, BOC capital structures do not necessarily reflect all of the debt that benefits regulated operations. As explained more fully below, we affirm our view that a large portion of debt issued to fund Employee Stock Ownership Plans (ESOPs) is rightly attributable to regulated operations and would have to be added to BOC debt if we were to adopt the LECs' preferred capital structure methodology.

42. USTA's observation that we were inconsistent because we adjusted RHC cost of equity estimates without making matching adjustments to capital structure does not impugn the reasonableness of the capital structure adopted in the *1990 Represcription Order*. Use of an RHC composite capital structure is consistent with our use of RHC cost of equity estimates because investors consider RHC, not BOC, capital structures in assessing the financial risks of investing in RHC stock. If, for the sake of consistency, we had attempted to adjust the RHC capital structure to remove the impact of nonregulated operations, consistency would then also have required a further downward adjustment to the RHC cost of equity estimates to recognize that those estimates reflect financial risks not presented by regulated operations.[84] Such adjustments would have been highly speculative[85] and would likely have cancelled one another.

43. LEC parties argue that our perception of manipulation of capital structures is unfounded and such manipulation is readily observable.[86] We need not find evidence that RHCs have manipulated the capital structure of their telephone subsidiaries in order to justify following a rule that removes an incentive for such manipulation.

1. Employee Stock Ownership Plans

44. In the *1990 Represcription Order*, we observed that the LECs' preferred methodology would inappropriately exclude debt used to finance Employee Stock Ownership Plans.[87] On reconsideration, a number of parties contend that, if the Commission must use RHC capital structures, the Commission must exclude ESOP debt from RHCs' capital structures because this debt is not available to the RHCs for operation funding, nor is it available to the LECs for rate base purposes.[88] Consumer Coalition contends that ESOP should be included as part of the debt structure because it is a necessary debt for the benefit of the LECs.[89]

45. ESOP debt, which is guaranteed by the RHCs, is largely for the benefit of the BOCs, because BOC employees make up about 90% of the RHC workforce. We agree with Consumer Coalition's observation that ESOP "is obviously part of the employees' overall compensation package and thus a necessary debt for the benefit of the BOCs.[90] Thus, we reject arguments for excluding ESOP debt from RHC capital structures.[91]

2. FASB 94

46. U S West states that most of the capital structure difference between U S West's RHC and BOC results, not from ESOPs, but from the implementation of Financial Accounting Standard No. 94 (FASB 94).[92] This accounting change required U S West's RHC to show financial services and real estate debt on its consolidated financial statement. Previously, *i.e.*, during the 1986 prescription proceeding, U S West's RHC did not have to show such debt on its consolidated financial statement. US West claims that this accounting change has no effect on capital structure and therefore, the Commission must exclude that debt associated with the accounting change if RHC capital structures are used.[93] Consumer Coalition maintains that U S West should not disregard its nonregulated companies' effect on the financial risk for the regulated entities because of an accounting change.[94]

47. As U S West asserts in an attached affidavit, the accounting change more accurately portrays the debt

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FCC 2d 960, 964 (1976) ("Accordingly, we shall use the present capital structure of 49 percent debt, 51 percent equity for purposes of this proceeding."); American Telephone and Telegraph Company, Petition for Modification of Prescribed Rate of Return, *Decision*, 86 FCC 2d 221, 266-267 (1981), *affirmed sub nom.*, U.S. v. FCC, 707 F.2d 610 (D.C. Cir. 1983)(Commission uses debt ratio of 47% in decision.).

[84] The downward adjustment we did make to the RHC cost of equity estimates was based on evidence of the business risks of nonregulated activities. *1990 Represcription Order*, 5 FCC Rcd at 7517, para. 86. That adjustment did not address the impact on RHC costs of equity of the presence of additional financial risk attendant upon those activities.

[85] Contrary to the apparent views of the LECs, we could not adjust capital structure for the impact of nonregulated operations by simply subtracting all non-BOC debt. This is because, unlike the cost of equity, capital structure does not directly reflect the capital market's assessment of risk. Rather, it reflects the deliberate choices of management. To adjust RHC capital structure to remove the impact of riskier nonregulated operations thus would logically require a speculative and contentious inquiry into what capital structure would or should have been chosen in the absence of nonregulated activity.

[86] *See* USTA Petition at 22; U S West Petition at 11; GTE Comments at 16-17.

[87] *1990 Represcription Order*, 5 FCC Rcd at 7510, para. 33.

[88] *See, e.g.* USTA Petition at 21; GTE Comments at 16; BellSouth Reply at 7.

[89] Consumer Coalition Opposition to Petitions at 56-57.

[90] Consumer Coalition Opposition to Petitions at 56-57.

[91] In its reply, USTA claims that, although accounting convention requires ESOP debt to look like debt, it is, in reality, still an equity cost, because the company must still pay dividends on this equity. The RHC accounting methodology for the ESOP debt is not just an "accounting convention," as USTA claims. It is instead required under Generally Accepted Accounting Principles (GAAP) to account for the substance of the transaction. *See* M. Miller, *Miller's Comprehensive GAAP Guide* 39.01 (1981), SEC SAB Release No. 8, Fed. Sec. L. Rep. (CCH)7008 (June 4, 1976). Because the RHC guarantees the ESOP debt and is the ESOP trust's only source of funds for repayment of the debt, GAAP treats it just as if the RHC had borrowed funds to purchase its own stock -- which would cause debt capital to increase and equity capital to decrease. We have no reason to disagree with GAAP on this issue. Thus, inasmuch as the substance of the ESOP is to shift equity capital to debt capital, USTA's claim is without merit.

[92] U S West Petition at 7-11. *See* Statement of Financial Accounting Standards No. 94 (No. 051 of the Financial Accounting series of the FASB of the Financial Accounting Foundation, Oct., 1987).

[93] U S West Petition at 12-13.

[94] Consumer Coalition Opposition to Petitions at 57-58.

obligations of the RHC.[95] We reject U S West's contention that we should exclude certain of its debt obligations simply because the reporting of those obligations was affected by FASB 94.

48. Finally, USTA claims the Commission did not follow its own rules because we did not use the latest capital structure information, *i.e.*, capital structure information as of December 31, 1989. The carriers are required to file the most recent data with us,[96] but not all carriers filed their December 31, 1989 information. Moreover, the composite capital structure of the RHCs, as of December 31, 1989, was 44.6% debt, 55.4% equity compared to the structure we used of 44.2% debt; 55.8% equity. We do not find this difference materially significant.

D. Interest rates

49. In the *1990 Represcription Order*, parties argued that the Commission recognized a relationship between interest rates and cost of equity capital in the *1986 Represcription Proceeding* and in extensions of the rate of return determined in 1986. Thus, they argued that the increase in interest rates since 1986 requires a higher rate of return. In rejecting these arguments, we noted that in the *1986 Represcription Proceeding*, we rejected the view that cost of equity moves in lockstep with interest rates. We went on to explain that the 1986 prescription took place at the end of a "two year decline in interest rates, during which interest rates went from record high levels to the lowest levels of the decade."[97] Moreover, we stated that our 1986 prescription was explicitly not based upon a risk premium method. Thus, we rejected contentions by the LECs that we were required to maintain the same risk premium implicit in the 1986 prescription.[98]

50. On reconsideration, LEC parties renew the claim that, because the Commission in 1986 recognized a relationship between interest rates and cost of equity capital, and because interest rates were higher in 1990 than in 1986, the Commission was required to prescribe a higher rate of return in 1990 than it prescribed in 1986.[99] BellSouth claims judicial support for an interest rate-cost of equity relationship.[100] Consumer Coalition maintains that, because the classic DCF is a market-based methodology, it reflects current interest rates.[101] Consumer Coalition also asserts that the parties mischaracterize the Commission's past statements about interest rates and costs of equity. Consumer Coalition claims that, in 1986, the Commission merely found that dramatic interest rate swings indicated that a two-year average DCF, based on historical data, would inappropriately bias the results upward.[102] Moreover, Consumer Coalition concludes that, contrary to BellSouth's implication, *Tennessee Gas* mandates that this Commission make no further adjustment for interest rate trends in order to remain consistent with the DCF theory.[103]

51. We reject again the parties' contentions that the relationship between interest rates and cost of equity requires us to prescribe a rate of return at or above the previously prescribed 12%. Although the Commission did state in 1986 that "we are confident that *ceteris paribus*, a decline in the risk-free interest rates will result in a decline in the cost of equity,"[104] the Commission did not make this statement in isolation. The LECs have continuously mischaracterized the context in which this statement was made.

52. In 1986, the Commission was using its then-recently adopted Part 65 rules for the first time. Part 65 specified use of an unusual "historical" DCF formula that used as inputs data averaged over a two-year period. In considering whether DCF estimates based on average dividend yields and average dividend growth rates from the years 1984-1985 should be given much weight in determining a rate of return for the period 1987-1988, the Commission said:

> As we discussed previously, we are taking notice of interest rate movements as measured by several different indicators. A declining trend in interest rates beginning in mid-1984 emerges from a review of those interest rate measures. According to Moody's, interest rates on Aa rated utility bonds have gone from a high of 14.9% in June 1984 to 9.36% in June 1986. Similarly, five-year treasury bond rates during that same time period fell from 13.54% to 7.64%.
>
> We are fully aware of the fact that interest rate declines (or increases) for bonds do not always result in a one-to-one corresponding decrease (or increase) in required returns on equity. We rejected a risk-premium approach, in part, because risk premiums fluctuate over time and fluctuate as interest rates change. We foresaw no administrative savings from use of a risk premium approach because the risk premium was not susceptible to precise, mathematical specification. On the other hand, we are confident that *ceteris paribus*, a decline in the risk-free interest rates will result in a decline in the cost of equity. In addition, the lower interest rates allow the carriers to lower their embedded debt costs by refinancing outstanding high-priced debt.
>
> The decline in interest rates during the 1984-1985 period is relevant not because it allows us to calculate a cost of equity, but rather because it indicates that estimates based on a two-year average DCF for 1984-1985 are entitled to less weight than more contemporaneous classic DCF estimates in deciding the correct rate of return for 1987-1988. Because of the strong evidence of a trend of declining interest rates, we conclude that a two-year average overstates the costs at the end of that period, with-

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[95] U S West Petition at Appendix A, p. 2 ("The new format [accounting change] makes existing information more apparent to the casual readers and users of financial statements.")

[96] 47 C.F.R. §§ 65.201(b)(3) and 65.300.

[97] *1990 Represcription Order*, 5 FCC Rcd at 7527, para. 173.

[98] *Id.*

[99] *See, e.g.* Bell Atlantic Petition at 11-12; SWB Petition at 19-24; USTA Petition at 3-7; GTE Comments at 10-12.

[100] BellSouth Comments at 2, *citing Tennessee Gas, supra.* n. 37.

[101] Consumer Coalition Opposition to Petitions at 40-41.

[102] *Id.* at 44-45.

[103] *Id.* at 9.

[104] *1986 Represcription Proceeding*, at para. 34.

> out the need to calculate costs of capital at different points throughout the period. Moreover, the continuing decline in interest rates suggests that current costs of capital are even lower than those prevailing at the end of 1985, and necessarily much lower than the results of a two-year average over 1984-1985. While we cannot use the interest rate data to predict with certainty what levels will prevail in 1987-1988, we can conclude with certainty that because of the decline in interest rates and hence capital costs, a two-year average overstates current costs of capital, as well as overstat[es] the costs at the end of that two-year period (footnotes omitted).[105]

Thus, when viewed in the context of the *1986 Represcription Proceeding*, it is clear that our previous statements about the relationship between interest rates and costs of equity cannot be read as a commitment on our part to increase our rate of return prescription when interest rates are greater than they were in 1986.

53. We acknowledge that interest rates are the most readily observable evidence of the cost of capital. They indicate with precision the current cost of debt. They are also, undeniably, evidence about the cost of equity; for example, it can virtually always be assumed that a company's cost of equity is higher than that same company's cost of debt. Determining the cost of equity on the basis of interest rates, however, requires the determination of a risk premium, *i.e.*, the additional return investors require to forego the more certain return on bonds in favor of the uncertain, but potentially greater, return on investment in equity. Unfortunately, risk premiums are not directly observable; the size of the risk premium applicable to any particular company's equity at any point in time is generally as controversial as any other method of estimating cost of equity. The undeniably correct observation that the risk premium inherent in the 1990 prescription is smaller than the risk premium inherent in the 1986 prescription is not, as the LECs contend, proof that the 1990 prescription is unreasonably low. In *United States v. FCC*, the United States Court of Appeals for the District of Columbia Circuit found that the risk premiums between telephone debt and telephone equity implicit in the Commission's past prescribed rates of return were 3.0%-4.9% in 1967; 3.25%-4.5% in 1972; 3.0%-3.25% in 1976; and 2.5% in 1981.[106] The 1986 prescription produced a risk premium of 3.01%-5.49%, while the risk premium inherent in the 1990 prescription was 3.41%-3.86%. In this broader historical perspective, the 1990 prescription does not appear unusual.

54. BellSouth's claim of judicial support in the *Tennessee Gas* decision misses the basic holding of that case: an agency, in applying its adopted methodologies for ratemaking, must be consistent. As discussed *supra*, any adjustment to DCF results because of an alleged flaw in the market's knowledge of all relevant information would be inconsistent. Moreover, if we were to accept the arguments that the increase in interest rates since 1986 requires us to adjust the cost of equity estimates produced by our DCF model, we would be guilty of precisely that which the court *Tennessee Gas* found "intolerable."

55. USTA argues that the Commission's recognition of an interest rate-cost of equity relationship in 1986 is at odds with its findings in the *1990 Represcription Order* that the two do not move in lockstep.[107] Consumer Coalition states that there is no inconsistency between the Commission's finding that interest rates and cost of equity do not move in "lockstep" and its finding that past interest rate trends are relevant. We addressed this issue in the *1990 Represcription Order*. We stated that we agreed with Consumer Coalition that the *1986 Represcription Proceeding* rejected the view that the cost of equity moves in lockstep with interest rates.[108] Thus, we reject USTA's objection on reconsideration.

56. BellSouth claims that the data in Appendix E of the *1990 Represcription Order* proves that there has been no reduction in the cost of equity for the LECs since 1986. BellSouth states that the costs of equity for the RHCs, electric utilities, and the S&P 400 for July 1990 are equal to or higher than they were in the third quarter of 1986.[109] BellSouth is correct that the record in 1990 demonstrates that estimates of RHCs' unadjusted cost of equity in third quarter 1986 were equal to or higher than those relied upon in reaching the cost of equity estimates in 1990. However, the 1986 represcription was based, not on third quarter 1986 data, but on fourth quarter 1985, and first quarter 1986 estimates.[110] Appendix E shows RHC estimates for those periods to be higher than the cost of equity estimates relied on in the 1990 prescription.

E. Competition/Infrastructure

57. In the *1990 Represcription Order*, we found that carriers face "far less business risk from competition than most nonregulated companies."[111] Moreover, to the extent competition exists, we concluded that our market-based cost of capital estimates captured investor perceptions of such risk.[112] We also determined that selecting a rate of return in the upper part of the range of reasonable cost of capital estimates would address our concern about potential lag in the deployment of infrastructure.[113]

58. SNET reiterates arguments made in the *1990 Represcription Order* proceeding that business risks and infrastructure concerns mandate a rate of return at or

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105 *Id.* at paras. 33-35.

106 U.S. v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983).

107 USTA Petition at 7. SWB also argues for inconsistencies in the *1990 Represcription Order*. SWB Petition at 19-25. SWB has fundamentally misread our *1990 Represcription Order*. We did not, as SWB claims, hold that "represcriptions focus on conditions prevailing over the two-year period prior to the represcription." *Id.* at 19. Rather, we rejected costs of equity estimates produced by a two-year average DCF, just as we did in 1986. Our costs of equity estimates were based on a forward-looking formula. *1990 Represcription Order*, 5 FCC Rcd at 7512, para. 48. Therefore, we reject arguments put forth by SWB premised on this misreading.

108 *1990 Represcription Order*, 5 FCC Rcd at 7527, para. 173. *See also 1986 Represcription Proceeding* at para. 34.

109 BellSouth Reply at 2.

110 *1986 Represcription Proceeding*, at para. 47.

111 *1990 Represcription Order*, 5 FCC Rcd at 7531, para. 210.

112 *Id.*

113 *Id.* at 7530, para. 203.

above 12%.[114] Centel supports SNET's contention, and also requests that this Commission apply "differential regulation" to nonBOC LECs.[115]

59. Ad Hoc states that SNET presents no new arguments in regard to competition and infrastructure issues.[116] Consumer Coalition avers that the DCF methodology considers all factors affecting the market.[117] In response to Centel's "differential regulation" argument, Consumer Coalition states that (1) Centel's current position is contrary to its position in the *1990 Represcription Order* proceeding,[118] and (2) Centel presents no reasons why this concern could not have been raised before.[119]

60. The arguments regarding competition and infrastructure issues were analyzed and discussed in considerable detail in the *1990 Represcription Order*;[120] we have been provided with no reason to alter our conclusions with respect to these issues. In response to SNET's claim that the authorized rate of return "is in fact selected 'to serve the price cap plan for the largest LECs,'"[121] we point to the DCF estimates as proof that the authorized rate of return was selected based on record evidence. Since Centel's request was not raised in a petition for reconsideration, we will not consider it.[122]

F. Relationship between Price Cap regulation and the authorized rate of return

61. U S West requests this Commission to state that the authorized rate of return has no role in determining whether overall earnings under price cap regulation are lawful.[123] GTE joins in this request, but goes further in seeking clarification of the role the authorized rate of return will have in complaint proceedings based on "particular rates." [124] GTE also would have us declare that the lower "formula adjustment mark"[125] will not be set below the identified zone of the cost of capital for interstate access.[126]

62. Consumer Coalition contends that GTE's "particular rates" argument is presented in the wrong proceeding. Moreover, Consumer Coalition states that the Commission cannot comply with GTE's request because the Commission cannot repeal Sections 206-209 of the Communications Act 'of 1934 which establish a private right of action for damages for violations of the Act. Consumer Coalition maintains that GTE's "lower adjustment mark" argument is also presented in the wrong proceeding; this should be addressed in the price caps docket. However, Consumer Coalition claims that, even assuming this issue should be addressed in the context of the authorized rate of return, the formula adjustment mark does not run afoul of the prohibition against confiscation.[127]

63. The *1990 Represcription Order* clearly stated that it must be read in conjunction with the concurrent decision in the price caps docket.[128] In the *LEC Price Cap Order*, we plainly held that "complaints claiming that overall company earnings that comply with the sharing mechanism are excessive in view of costs will not lie."[129] Thus, U S West is correct that the authorized rate of return will not be considered in determining whether overall earnings under price cap regulation are lawful. If, however, a carrier does not comply with the sharing mechanism, a complaint that a carrier's overall earnings are unlawful would be based on the degree of non-compliance with the sharing mechanism.

64. We find GTE's version of the relationship between the authorized rate of return and "particular rates" under price caps untenable. In the *LEC Price Caps Order*, we specifically found that, "[s]ince our sharing mechanism does not relate to specific rates, ... complaints that particular rates are unjust and unreasonable in light of the relevant costs and profits ... may continue to be filed."[130] We also agree with Consumer Coalition that the proper forum for GTE's request to declare that the lower formula adjustment mark cannot be set below the cost of

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[114] SNET Petition at 4-10. SNET specifically claims that price cap regulation increases business risk because the Commission imposed a productivity target higher than nonBOC LEC productivity potential while lowering the authorized rate of return. *Id.* at 6-7.

[115] Centel states that it has "repeatedly asked the Commission to differentiate among carriers in its regulation." Centel Comments at 4. However, in its comments, Centel does not explain how differential regulation would function.

[116] Ad Hoc Comments at 3, 7.

[117] Consumer Coalition Opposition to Petitions at 41-43.

[118] Consumer Coalition Opposition to Comments at 11 ("In fact, in its Reply Comments to Proposed Findings and Conclusions, filed July 16, 1990, Centel clearly stated, at 2, that it 'agrees with USTA that the Commission should find that the weight of evidence supports an authorized *unitary rate of return for the LECs*.'")

[119] *Id.* at 12.

[120] *1990 Represcription Order*, 5 FCC Rcd at 7530-7531, paras. 205-212.

[121] SNET Petition at 7-8, *citing* Cincinnati Bell Telephone Petition for Reconsideration in CC Docket No. 87-313, filed November 21, 1990.

[122] Even if Centel had raised this matter in a petition for reconsideration, it is unclear that its failure to raise it earlier in the proceeding could be justified. *See* 47 C.F.R. § 1.429(b).

[123] U S West Petition at 4-6.

[124] GTE Comments at 3.

[125] The "lower adjustment mark" is the point at which a price cap carrier is entitled to adjust its rates upward to target earnings to an amount not to exceed the lower mark of 10.25% return on investment. We chose to allow this adjustment to ensure that price cap LECs are not subjected to such low earnings over a prolonged period of time that they are impaired in their ability to attract capital or provide services. Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, 6802 at para. 127 (1990) (*LEC Price Cap Order*), *recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Recon. Order*).

[126] GTE Comments at 9.

[127] Consumer Coalition states that because the adjustment mark is not being prescribed as a maximum rate of return, it need not be within the "zone of reasonableness" required for conventional maximum prescription of the authorized rate of return. Rather, viewed in the context of the price caps scheme, the "total effect of government action" is reasonable. Consumer Coalition Opposition to Comments at 4.

[128] *1990 Represcription Order*, 5 FCC Rcd at 7532, para. 218. *See also LEC Price Cap Order*, *supra* n. 125.

[129] *LEC Price Cap Order*, 5 FCC Rcd at 6836, para. 406. *See also LEC Price Cap Recon. Order*, 6 FCC Rcd at 2733, para. 206.

[130] *LEC Price Cap Order*, 5 FCC Rcd at 6836, para. 406. *See also LEC Price Cap Recon. Order*, 6 FCC Rcd at 2733-34, paras. 206-207.

capital for interstate access is the price caps docket. We fully addressed this issue in the *LEC Price Caps Recon. Order*, therefore we need not discuss it further.[131]

IV. CONCLUSION

65. We have examined the petitions for reconsideration and the comments thereon. We find no persuasive evidence that requires us to reconsider our decision to set the authorized rate of return at 11.25%. We clarify that the authorized rate or return may not be used to prove the unreasonableness of a price cap carrier's overall earnings. Other issues concerning price cap regulation are beyond the scope of this Order, and properly should be presented in the price cap docket, CC Docket 87-313.

V. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 405, that the Petitions for Reconsideration seeking reconsideration of the authorized rate of return of the Bell Atlantic Companies, Southern New England Telephone Company, Southwestern Bell Telephone Company, United States Telephone Association, and U S West Communications, ARE DENIED.

67. IT IS FURTHER ORDERED, that the Petition for Reconsideration of U S West Communications seeking clarification on the relationship between the authorized rate of return and price cap regulation IS GRANTED.

68. IT IS FURTHER ORDERED, that the motions to exceed page limitations filed by Consumer Coalition and Southwestern Bell Telephone Company ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The Ad Hoc Telecommunications Users Committee (Ad Hoc)

The Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth)

Central Telephone Company (Centel)

Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation (Consumer Coalition)

GTE Service Corporation and its affiliated domestic telephone companies (GTE)

Pacific Bell and Nevada Bell (PacTel)

Southern New England Telephone (SNET)

Southwestern Bell Telephone Company (SWB)

United States Telephone Association (USTA)

U S West Communications (U S West)

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[131] *LEC Price Cap Recon. Order*, 6 FCC Rcd at 2690-2691, paras. 116-117. Moreover, because GTE raised an issue not addressed by any petitioner, and GTE could have petitioned the Commission itself on this issue, we do not feel compelled to address GTE's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

CONTINENTAL CELLULAR — File No. 10003-CL-P-316-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel).

and

In re:

Nineteen Rural Service Area Applications Filed by Partnerships with Alien Partners	File Nos. 10109-CL-P-675-A-88 10311-CL-P-403-A-88 10621-CL-P-366-A-89 10513-CL-P-460-A-89 10226-CL-P-423-A-88 10625-CL-P-370-A-89 10511-CL-P-458-A-89 10104-CL-P-545-A-88 10613-CL-P-313-A-89 10504-CL-P-440-A-89 10038-CL-P-319-A-88 10049-CL-P-699-A-88 10449-CL-P-509-A-89 10265-CL-P-488-A-88 10407-CL-P-659-A-88 10420-CL-P-672-A-89 10083-CL-P-611-A-88 10174-CL-P-634-A-88 10230-CL-P-427-A-88

ERRATUM

Released: December 6, 1991

The *Memorandum Opinion and Order*, FCC 91-355, released November 20, 1991, in the above-captioned matter inadvertantly included the application filed by Cellwave Telephone Services L.P. (File No. 10625-CL-P-370-A-89) for the Florida 11 (Monroe) RSA. While this application was initially dismissed for impermissible alien ownership, the issues involved are different from those discussed in the underlying Order. Accordingly, the Order is hereby amended as follows:

In re Application of:

CONTINENTAL CELLULAR — File No. 10003-CL-P-316-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel).

and

In re:

Eighteen Rural Service Area Applications Filed by Partnerships with Alien Partners	File Nos. 10109-CL-P-675-A-88 10311-CL-P-403-A-88 10621-CL-P-366-A-89 10513-CL-P-460-A-89 10226-CL-P-423-A-88 10511-CL-P-458-A-89 10104-CL-P-545-A-88 10613-CL-P-313-A-89 10504-CL-P-440-A-89 10038-CL-P-319-A-88 10049-CL-P-699-A-88 10449-CL-P-509-A-89 10265-CL-P-488-A-88 10407-CL-P-659-A-88 10420-CL-P-672-A-89 10083-CL-P-611-A-88 10174-CL-P-634-A-88 10230-CL-P-427-A-88

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2. The Mobile Services Division (MSD) has also dismissed twenty other applications for various nonwireline RSA markets because the applicants had impermissible alien non-insulated partners under Section 310(b)(3) of the Communications Act. All of these applicants have filed petitions for reconsideration. Because of the similarity of the issues presented in eighteen of these proceedings named in the Committee for a Fair Lottery's motion, we are consolidating the pleadings of those applicants (listed in Appendix A) hereto.[4] Additionally, we deny the petitioners' requests for oral argument because the written record is sufficient to allow us to make a decision.

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6. Continental then filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit (court). On October 1, 1990, at the Commission's request, the court remanded the case for further consideration of the record.[9] On November 28, 1990, Continental filed Supplemental Comments. The 17 general partnership applicants filed applications for various RSA markets, won the lottery in a market, and were named tentative selectee for the markets in which they won the lottery. The general

partnership applicants each had from one to four alien general partners which owned from 2 to 25.984 percent of the applicant. All of these applicants filed amendments to change their alien general partners to limited partners after their applications were filed or to otherwise divest the alien of any control in the partnership. The MSD dismissed these applications for failure to comply with the alien ownership restrictions in Section 310(b)(3) of the Act. All of the general partnerships filed petitions for reconsideration of their dismissals. Sacramento filed an application as a limited partnership pursuant to California law, won a lottery and was named tentative selectee for that market. Sacramento's application was dismissed because it had a 4.545 percent alien non-insulated limited partner in violation of Section 310(b)(3) of the Act.

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20. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by 21st Century (Utah), 21st Century (Ind), Cells, Cellswitch, CRLP, CGSA, Electronics, Delta, Eastern, Federal, Independent, Jefferson, Moving Phones, Quadrangle, Sacramento, Silver Wings, USTP and Western ARE HEREBY DENIED.

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FOOTNOTES

[4] We are not including the pleadings filed by FutureWave General Partners (File No. 10810-CL-P-615-A-89), Rural America General Partnership L.P. (File No. 10802-CL-P-560-A-89), U.S. RSA Telco Partners (File No. 10815-CL-P-620-A-89), or Cellwave Telephone Services L.P. (File No. 10625-CL-P-370-A-89) as requested by the Committee for a Fair Lottery as those proceedings involve different issues. Great Western Cellular Partners (File No. 10269-CL-P-492-A-90) has also been dismissed for violation of our alien ownership rules. As it also involves different alien ownership issues, it will not be included with the other dismissals in this Order.

APPENDIX A

The following applications have been consolidated with the Continental Cellular for consideration on the record:

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Utah))
File No. 10109-CL-P-675-A-88
Utah 3 - Juab

21st CENTURY TELECOM
(Hereafter referred to as 21st Century (Ind))
File No. 10311-CL-P-403-A-88
Indiana 1 - Newton

CELLS COMPANY L.P.
(Hereafter referred to as Cells)
File No. 10621-CL-P-366-A-89
Florida 7 - Hamilton

CELLSWITCH L.P.
(Hereafter referred to as Cellswitch)
File No. 10513-CL-P-460-A-89
Louisiana 7 - West Feliciana

CELLULAR REGIONAL LIMITED PARTNERSHIP
(Hereafter referred to as CRLP)
File No. 10266-CL-P-423-A-88
Iowa 12 - Winneshiek

CGSA TELEPHONES
(Hereafter referred to as CGSA)
File No. 10511-CL-P-458-A-89
Louisiana 5 - Beauregard

CONTINENTAL ELECTRONICS
(Hereafter referred to as Electronics)
File No. 10104-CL-P-545-A-88
Nevada 3 - Storey

DELTA CELLULAR PARTNERS
(Hereafter referred to as Delta)
File No. 10613-CL-P-313-A-89
Alabama 7 - Butler

EASTERN CELLULAR SYSTEMS L.P.
(Hereafter referred to as Eastern)
File No. 10504-CL-P-440-A-89
Kansas 13 - Edwards

FEDERAL MOBILE RADIO
(Hereafter referred to as Federal)
File No. 10038-CL-P-319-A-88
Arizona 2 - Coconino

INDEPENDENT CELLULAR SYSTEMS L.P.
(Hereafter referred to as Independent)
File No. 10049-CL-P-699-A-88
Washington 7 - Skamania

JEFFERSON CELLULAR L.P.
(Hereafter referred to as Jefferson)
File No. 10449-CL-P-509-A-89
Missouri 6 - Marion

MOVING PHONES PARTNERSHIP L.P.
(Hereafter referred to as Moving Phones)
File No. 10265-CL-P-488-A-88
Minnesota 7 - Chippewa

QUADRANGLE COMMUNICATIONS
(Hereafter referred to as Quadrangle)
File No. 10407-CL-P-659-A-88
Texas 8 - Gaines

SACRAMENTO RSA LIMITED PARTNERSHIP
(Hereafter referred to as Sacramento)
File No. 10420-CL-P-672-A-89
Texas 21 - Chambers

SILVER WINGS 1988 L.P.
(Hereafter referred to as Silver Wings)
File No. 10083-CL-P-611-A-88
Oregon 6 - Crook

U.S. RSA TELCO PARTNERS
(Hereafter referred to as USTS)
File No. 10174-CL-P-634-A-88
South Dakota 1 - Harding

WESTERN CELLTEL L.P.
(Hereafter referred to as Western)
File No. 10230-CL-P-427-A-88
Iowa 16 - Lyon

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-101

In re Applications of

HARA BROADCASTING, INC. File No. BPH-890316MD

SHARON M. MORAN File No. BPH-890316MF

For Construction Permit for
New FM Station, Channel 231A,
Leland, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: December 9, 1991

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. Before the Review Board is a Petition for Extraordinary Relief filed by Sharon M. Moran (Moran) on November 8, 1991, alleging that the Presiding Officer in this proceeding committed egregious error in failing to add basic qualifying issues against Hara Broadcasting, Inc. (Hara), in response to her earlier-filed Petition to Enlarge Issues. Hara filed an Opposition to Moran's Petition on November 21, 1991.

2. More specifically, Moran claims that on August 16, 1991, she filed a Petition to Enlarge Issues against Hara.[1] However, by *Memorandum Opinion and Order*, FCC 91M-3060, released October 10, 1991, the Administrative Law Judge (ALJ) declined to add the requested issues.[2] Thereafter, on October 15, 1991, Moran sought authority from the ALJ for leave to appeal his ruling to the Review Board. In *Memorandum Opinion and Order*, FCC 91M-3195, released November 4, 1991, the ALJ denied Moran's motion.

3. The Board generally will not entertain an unauthorized interlocutory appeal such as that presented here, and will await the timely filing of exceptions that may be appropriately raised upon review of the *Initial Decision*, *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991); 47 CFR § 1.301(b)(1), "unless egregious error or flagrant abuse of discretion is shown." *Capitol City Broadcasting Co.*, 6 FCC Rcd 5621 (Rev. Bd. 1991). *See Welch Communications, Inc.*, 5 FCC Rcd 7066, 7067 (Rev. Bd. 1990) ("addition of hearing issues . . . is entrusted to the ALJ by the Commission's Rules [and] is not a matter subject to extraordinary relief"); *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990); *Communications Satellite Corp.*, 32 FCC 2d 533 (1971). Further, no showing has been made here that the ALJ's "interlocutory ruling raises far-reaching and vital concerns to the public interest which could not otherwise be adequately protected" upon review of the *Initial Decision*. *Carmel Broadcasting, supra.*

4. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed November 8, 1991 by Sharon M. Moran, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] In salient part, Moran has shown that Hara's President, Director and sole shareholder, Donn Ansell was arrested on September 29, 1988 and charged with commission of a "crime against nature," a felony under North Carolina statutes. (Hara explains that Ansell "is gay," and was found "with another man in a park" by an undercover police officer on that date. Hara Opposition at 4.) Ansell was convicted of the crime on February 27, 1989 and sentenced to three years in prison, suspended on supervised probation for three years. Moran claims that Hara, however, in filing FCC Form 314 to acquire WAAV (AM), Leland, North Carolina, some 19 days after Ansell's arrest (on October 18, 1988), responded "no" to Question 4(b) of Section II of that application form which sought disclosure of any pending felony charges. Additionally, when Hara filed FCC Form 301 in this proceeding on March 16, 1989 (some 17 days subsequent to Ansell's felony conviction), a negative response was similarly entered with respect to Question 10(a) of Section II (which asks for disclosure of any felony convictions).

[2] In this *Memorandum Opinion and Order*, the ALJ reasoned (at paras. 5-6):

> The requested issues although timely filed are not warranted. Ansell's convictions were not for crimes which involved a false statement or dishonesty. The [Commission's *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986)] did not identify crimes like Ansell's as relevant to any character inquiry. Nor has the Commission ever disqualified an applicant on character grounds because the applicant's principal had been convicted of a crime like Ansell's. Although Question 4 of Form 314 used by Ansell required the listing of felony convictions and pending felony charges, the requirement has to be regarded in light of the Commission policy enunciated in its 1986 statement. Additionally, although Question 10 of the new Form 301 requests information concerning felonies, that language is qualified by the instructions which describe and cite the Commission's 1986 Policy Statement.
>
> Nor was Ansell required to report his conviction pursuant to the new Section 1.65(c). That section requires licensees "to report adjudications relevant to character qualifications that are issued during the license term." *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1991). Ansell's convictions occurred prior to his acquisition of WAAV and prior to his current license term.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-352

In re Applications of

WCVQ, Inc.	File No. BPCT-871224KG
NICHOLS BROADCASTING CORPORATION	File No. BPCT-880301KF
MAPLE LEAF BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-880301KG
LAKE CHAMPLAIN COMMUNICATIONS, INC.	File No. BPCT-880301KH
BURLINGTON CHANNEL 44, INC.	File No. BPCT-880301KI
BURLINGTON 44 COMPANY	File No. BPCT-880301KL
DAVID McMEEKIN	File No. BPCT-880301KM

For Construction Permit for New Television Station, Channel 44, Burlington, Vermont

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1991; Released: December 9, 1991

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. The Review Board has before it exceptions to the *Initial Decision*, 4 FCC Rcd 8554 (1989)(*I.D.*), in which Administrative Law Judge Edward Luton (ALJ) granted the application of Lake Champlain Communications, Inc. (LCC). Shortly after exceptions were originally filed, the Commission, which had before it an appeal from an interlocutory ruling in this proceeding, remanded the case to the ALJ. By *Order*, FCC 91M-2679 (as corrected), released August 29, 1991, the ALJ terminated the remand proceeding and transferred jurisdiction of the case back to the Board.

2. The ALJ's grant to LCC was based on his ultimate conclusion that LCC was the comparatively superior applicant, notwithstanding that both WCVC, Inc. and Nichols received substantial coverage preferences over the other applicants (save Burlington 44 Company where the preference was slight), including LCC. LCC's overall proposal was preferred because of the purportedly superior qualitative attributes of its principals on the ownership/management criterion of the standard comparative issue. *See generally Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). The exceptions claim that the ALJ erred in failing to properly weigh the comparative coverage preferences into the overall comparative calculus, citing to case precedent that suggests that a substantial preference for comparative television coverage may outweigh a substantial integration preference. *See e.g., FBC, Incorp.*, 95 FCC 2d 256, 258-262 (Rev. Bd. 1983). The Joint Engineering Exhibit (Jt. Eng. Exh. 1) reflects, *inter alia*, that only WCVQ and Nichols propose to provide a first service to certain areas and populations and that their proposed second service substantially exceeds that proposed by the other applicants. *See I.D.*, 4 FCC Rcd at 8562.

3. Consistent with the precedent existing at the time of the release of the *I.D.*, the joint engineering exhibit excluded the signals of noncommercial television stations in calculating the underserved areas and populations. However, in *Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188 (1991)(released on September 4), the Commission modified its prior practice on ascertaining underserved areas, holding that it would no longer exempt noncommercial educational stations from consideration under comparative coverage issues.

4. In light of this change of policy, it is necessary to the Board's consideration of this proceeding to have the parties supplement their joint engineering exhibit to show the effects of noncommercial educational television service on the areas and populations analysis under the comparative coverage issue. As the Commission observed in *Channel 32 Broadcasting Co.*, FCC 91I-026, released April 17, 1991, at para. 3, this is a "simple mathematical process involving the superimposition of any applicable noncommercial educational station's grade B field strength contour, as currently on file at the Commission, on the applicants' joint engineering with respect to any areas served by five or fewer television stations."

5. The parties are directed to file their joint supplement within 20 days of the release date of this order. If the parties are unable to reach a joint stipulation, each party should file a status report indicating its respective position. Additionally, in the event that the parties are unable to reach agreement, the Mass Media Bureau should comment on the positions of the parties no later than ten days after the submissions of the parties. The applicants are also directed to comment on the extent to which any comparative coverage preferences may be warranted on the basis of the requested stipulation, and the impact such preferences shall have on the comparative posture of this case.

6. ACCORDINGLY, IT IS ORDERED, That the parties ARE DIRECTED to file a submission in accordance with paragraphs four and five above.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-295

In re Applications of

SUSAN D. BROWN File No. BPH-880602OJ

PAMELA R. JONES File No. BPH-880602OL

For Construction Permit for
New FM Station, Channel 287A,
Roanoke, Virginia

Appearances

Julian P. Freret, Esq. on behalf of Susan D. Brown; *Michael J. Wilhelm, Esq.* on behalf of Pamela R. Jones.

DECISION

Adopted: November 27, 1991; Released: December 9, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

BOARD CHAIRMAN MARINO:

1. Susan B. Brown (Brown) was found to be the superior comparative applicant for a new FM broadcast station in Roanoke, Virgina. *See Summary Decision* (S.D.), 6 FCC Rcd 4407 (1991), of Administrative Law Judge Richard L. Sippel (ALJ). In her exceptions (at 1), Pamela R. Jones, the remaining applicant, "does not contest" that Brown was the superior applicant entitled to summary judgment on this aspect of the case. Rather, she contends that the sole question presented on appeal is whether Brown had a duty to amend her application when she incurred an additional $20,000 financial obligation "in the context of a settlement with a competitor." *Id.*, at 2. We affirm the ALJ's actions in this case which are supported by the factual record and controlling precedent.

2. *BACKGROUND*: No financial issue was specified against Brown in the *Hearing Designation Order* (HDO), 5 FCC Rcd 3758 (1990). On the first day of the hearing, May 15, 1991, Brown and a third applicant then in the proceeding agreed that the latter would dismiss its application in return for Brown's promise to pay it $30,000. That sum was to be paid: $10,000 on dismissal of the application; $10,000 on the grant of Brown's application; and $10,000 within a year. This settlement was approved as being in the public interest by the ALJ. *Order*, FCC 91M-1681, released May 21, 1991.

3. On May 24, 1991, Jones sought a hearing issue to determine whether Brown had reasonable assurance of sufficient funds to meet her settlement commitments and to construct and operate the proposed station. Jones asserted that, with Brown's new commitment to pay a total of $20,000 once the application is granted, there had been a material change in her financial condition; and, thus, Brown was obligated to amend her application to show how she could still construct and operate her proposed station and meet the new expenses. Brown responded with a certified statement under penalty of perjury dated June 3, 1991 that she had "available the said $20,000, in addition to funding previously available for construction and operation of [her] proposed station." Her statement also specified that the funds available for the settlement expenses were "separate and apart from, and in addition to, those available for construction and operation of my proposed station."

4. By *Memorandum Opinion and Order*, FCC 91M-2172, released July 15, 1991, the ALJ denied Jones' motion for an issue because it was based upon an "unverified assumption . . . that Brown does not have the funding" "[b]ut Brown has categorically stated under oath that she does have the funding." *Id.*, at para. 8. The ALJ reasoned:

> Jones' thesis is grounded only upon speculation. Conclusory allegations based on speculation are held to be insufficient to raise substantial questions of fact for litigation of a financial issue. *Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989).
>
> [I]t is noted that Jones has failed to show that she has specific evidence of Brown's financial inability supported by an affidavit of a person having personal knowledge of Brown's current financial condition. 47 CFR § 1.229(d).

5. *DISCUSSION:* Appellant Jones does not dispute the ALJ's finding that she failed to raise any substantial questions of fact about Brown's finances that would require a hearing pursuant to Section 1.229(d), *see Schwier, supra*; nor could she. Appellant's only contention is that the ALJ erred in failing to require Brown to amend following the settlement agreement to show how she would finance both the settlement and construction and operation expenses. On the facts of this case, Jones' contention is legally untenable.

6. Generally, an applicant is obliged to amend its application to show additional expenses only where its financial qualifications have already been called into question, *e.g.*, where a financial issue has been designated or where the applicant has not been able to certify that it is financially qualified. *Cf. Carol Sue Bowman*, 6 FCC Rcd 10 (Rev. Bd. 1991), *rev. denied*, 6 FCC Rcd 4723 (1991). We have also held that an applicant must also be able to demonstrate its financial ability to satisfy possible legal fees, acquisition of transmitter site, or a realistic rental for the studio location where a substantial question has been raised. *See, e.g., United Broadcasting Co. (KBAY-FM)*, 53 RR 2d 57, 81 (1983); *see also Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8161 paras. 60-61 (Rev. Bd. 1990) (subsequent history omitted). And, in *Edwin A. Bernstein*, FCC 91R-105, adopted November 11, 1991, we repeated that "loss of a critical financial commitment is certainly of decisional significance, and must be timely reported under 47 CFR § 1.65. *See Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991). However, where an applicant's finances have not been questioned in a proceeding, neither the Commission nor the Review Board has generally required a financial amendment following a partial or global settlement reached among the

parties. A Section 1.65 duty to report and amend is "only triggered where an applicant loses reasonable assurance [of adequate financing] after it has filed its application." *Weyburn Broadcasting Limited Partnership*, 6 FCC Rcd 1262, 1265 (Rev. Bd. 1991); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385, 3387 (Rev. Bd. 1990). *See also F.E.M. Ray, Inc.*, 6 FCC Rcd 4238, 4240 n. 5 (Rev. Bd. 1991).

7. No financial issue had been designated here and Jones' argument rests on speculation that Brown's additional $20,000 settlement expenses will cause "a material change in her financial condition." In the present case, as the ALJ observed, Jones has proffered absolutely no support concerning "Brown's financial inability." Thus, her exception rests on surmise or speculation, neither of which meets the threshhold requirement for mandating a hearing, or an amendment pursuant to Section 1.65. *Weyburn Broadcasting, Inc.*, 6 FCC Rcd at 1264-65. We affirm the ALJ's grant of Brown's uncontested superior comparative application.

8. ACCORDINGLY, IT IS ORDERED, That the application of Susan D. Brown (File No. BPH-880602OJ) IS GRANTED; and that the application of Pamela R. Jones (File No. BPH-880602OL) IS DENIED; and,

9. IT IS FURTHER ORDERED, That the Motion to accept late-filed pleading of Pamela R. Jones, filed August 20, 1991, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-353

In the Matter of

Amendment of Section 73.202(b), RM-7863
Table of Allotments,
FM Broadcast Stations.
(Altoona, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 26, 1991; Released: December 9, 1991

Comment Date: January 30, 1992
Reply Comment Date: February 14, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Alpenglow Communications, Inc. ("petitioner"), requesting the substitution of Channel 251C3 for Channel 251A at Altoona, Wisconsin. Petitioner also requests modification of its construction permit (BPH-900517MH) for Station WISM-FM, Channel 251A, to specify operation on Channel 251C3.

2. We believe petitioner's proposal warrants consideration. Channel 251C3 can be allotted to Altoona, Wisconsin, consistent with the Commission's spacing requirements, at petitioner's specified site 9.3 kilometers (5.8 miles) south of the community. [1] We shall also propose to modify the construction permit for station WISM-FM, Channel 251A, to specify operation on Channel 251C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 251C3 for Channel 251A at Altoona, Wisconsin, since it could provide the community with a wide coverage area station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Altoona, Wisconsin	251A	251C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 30, 1992,** and reply comments on or before **February 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Clifford E. Brane, President
Alpenglow Communications, Inc.
5555 Zuni N.E. , Suite 378
Albuquerque, New Mexico 87108

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251C3 at Altoona are 44-43-35 and 91-25-06.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-352

In the Matter of

Amendment of Section 73.202(b), RM-7866
Table of Allotments,
FM Broadcast Stations.
(Ava, Branson and
Mountain Grove, Missouri)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: November 26, 1991; Released: December 9, 1991

Comment Date: January 30, 1992
Reply Comment Date: February 14, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Turtle Broadcasting Co. of Branson ("petitioner") requesting the substitution of Channel 292C2 for Channel 292C3 at Branson, Missouri. Petitioner also requests modification of its construction permit (BPH-910520IE) for Station KRZK(FM) to specify operation on the higher class channel. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Branson with a wide coverage area FM service. Petitioner notes that Channel 292C2 can be allotted to Branson, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 223A is substituted for Channel 293A, Mountain Grove, Missouri and Channel 221A is substituted for Channel 222A, Ava, Missouri. [1] Channel 292C2 at Branson would be short spaced to Channel 292A, Station KOZX, Cabool, Missouri. However, the license for Station KOZX has been modified to specify operation on Channel 251A.[2]

3. Station KCMG-FM operates on Channel 293A, Mountain Grove, Missouri, and Station KKOZ-FM operates on Channel 222A, Ava, Missouri. The proposed substitutions at Mountain Grove and Ava can be accomplished in ompliance with the minimum distance separation requirements of the Commission's Rules at the current sites for Station KCMG-FM and Station KKOZ-FM.[3] We shall also propose to modify the license of Station KRZK(FM), Channel 292C3, to specify operation on Channel 292C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it would reimburse the affected station for the costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station KCMG-FM, Mountain Grove, and Station KKOZ-FM, Ava, for the reasonable costs in changing frequency.

5. In view of the above, we believe the public interest would be served by proposing the allotment of Channel 292C2 to Branson, Missouri, since it could provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ava, Missouri	222A	221A
Branson, Missouri	292C3	292C2
Mountain Grove, Missouri	293A	223A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Communications Works, Inc., the licensee of Station KCMG-FM, Mountain Grove, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 223A in lieu of Channel 293A and Corum Industries, Inc., the licensee of Station KKOZ-FM, Ava, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 221A in lieu of Channel 222A.

7. Pursuant to Section 1.87 of the Commission's Rules, Communications Works, Inc., and/or Corum Industries, Inc., may, not later than **January 30, 1992,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Com-

[1] The coordinates for Channel 292C2, Branson, are 36-43-00 and 93-05-00.

[2] *See* 4 FCC Rcd 601 (1989). We will serve the licensee of Station KOZX with a copy of this *Order*.

[3] The coordinates for Channel 223A, Mountain Grove, Missouri, are 37-08-07 and 92-14-59. The coordinates for Channel 221A, Ava, Missouri, are 36-55-48 and 92-39-19. Channel 221A at Ava would be short-spaced to Channel 221A, Lebanon, Missouri, and to an application for Channel 221C3, Clinton, Arkansas, filed by the licensee of Station KHPQ, Channel 221A, Clinton. We note that the license for Station KLWT-FM, Channel 221A, Lebanon, was modified to specify operation on Channel 300C2 in MM Docket No. 86-278. *See* 2 FCC Rcd 6786 (1987). We also note that although Channel 221A at Ava would be short-spaced to the application for Channel 221C3, Clinton, it is fully spaced to the allotment site for Channel 221C3. Further, the application for Channel 221C3, Clinton (BPH911021ID) was returned on November 13, 1991. We will serve Station KLWT-FM and Station KHPQ with a copy of this *Order*.

munications Works, Inc., and/or Corum Industries, Inc., to furnish additional information. If Communications Works, Inc., and/or Corum Industries, Inc., raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Communications Works, Inc., and/or Corum Industries, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

Communications Works, Inc.
Station KCMG-FM
P.O. Box 804
Mountain Grove, Missouri 65711

Corum Industries, Inc.
Station KKOZ-FM
P.O. Box 386
Ava, Missouri 65608

Lebanon Broadcasting Co., Inc.
Station KLWT-FM
Rt. 2, Box 29
Lebanon, Missouri 65536

Weber-King Radio
Station KHPQ
Main & Griggs
Clinton, Arkansas 72031

KVVC Broadcasting, Inc.
Station KOZX
P.O. Box 514
Cabool, Missouri 65689

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **January 30, 1992,** and reply comments on or before **February 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III
Post Office Box 4203
Wilmington, North Carolina 28406

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-351

In the Matter of

Amendment of Section 73.202(b), RM-7864
Table of Allotments,
FM Broadcast Stations.
(Detroit Lakes, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 26, 1991; Released: December 9, 1991

Comment Date: January 30, 1992
Reply Comment Date: February 14, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Robert D. Spilman ("petitioner") requesting the allotment of Channel 272C2 to Detroit Lakes, Minnesota, as that community's second FM broadcast service. [1] Petitioner submitted information in support of the proposal and stated his intention to file an application if the channel is allotted to Detroit Lakes.

2. We believe petitioner's proposal warrants consideration. Channel 272C2 can be allotted to Detroit Lakes, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction. [2] Since Detroit Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be required for this allotment.

3. In view of the fact that the proposed allotment would provide an additional broadcast service to Detroit Lakes, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Detroit Lakes, Minnesota	236C1	236C1, 272C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 30, 1992** and reply comments on or before **February 14, 1992** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel:

John S. Neely
Miller & Miller, P. C.
P.O. Box 33003
Washington, D. C. 20033

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] A *Report and Order* was issued August 15, 1990, which dismissed a proposal to allot Channel 272C2 to Detroit Lakes, Minnesota, as a second service. *See* 5 FCC Rcd 5186 (1990).
[2] The coordinates for Channel 272C2 are 46-48-54 and 95-50-48.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-257

In the Matter of

Amendment of Section 73.202(b), RM-7779
Table of Allotments,
FM Broadcast Stations.
(Venice, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 26, 1991; Released: December 9, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 6 FCC Rcd 5219 (1991), issued in response to a petition for rule making filed by Asterisk Radio, Inc. ("petitioner"), proposing the substitution of Channel 221C3 for Channel 221A at Venice, and modification of its license for Station WCTQ(FM) to specify operation on the higher class channel. Petitioner filed comments reaffirming its interest. No other comments were filed.

2. We believe the public interest would be served by the substitution of Channel 221C3 for Channel 221A at Venice, since it could provide the community with a wide coverage area FM service. Channel 221C3 can be allotted to Venice in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) north,[1] in order to avoid a short-spacing to Station WYFO(FM), Channel 220C3, Lakeland, Florida. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WCTQ(FM) to specify operation on Channel 221C3. Channel 221C3 at Venice is currently short-spaced to Station WKZY(FM), Channel 221A, LaBelle, Florida. However, Station WKZY(FM) was moved to Channel 223A in MM Docket No. 88-608, and currently holds a construction permit (BPH-900830IH) for the channel. Therefore, issuance of a construction permit or license to cover the construction permit for Channel 221C3 at Venice may be withheld until Station WKZY(FM) is licensed on Channel 223A.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 23, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Venice, Florida	221C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Asterisk Radio, Inc., for Station WCTQ(FM), Venice, Florida, IS MODIFIED, to specify operation on Channel 221C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Asterisk Radio, Inc., licensee of Station WCTQ(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Venice are North Latitude 27-10-55 and West Longitude 82-28-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-25

In re Applications of

STANDARD BROADCASTING, INC. File No. BPH-870624MI

LEXINGTON COMMUNICATIONS, LTD. File No. BPH-870629MV

For Construction Permit for a
New FM Station on Channel 253A
in Lexington, South Carolina

Appearances

Lawrence J. Bernard, Jr., on behalf of Standard Broadcasting, Inc.; *James J. Freeman* and *Lynn E. Shapiro*, on behalf of Lexington Communications, Ltd.; and *Gary Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: December 4, 1991; Released: December 10, 1991

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* (HDO), released February 13, 1990, the Chief, Audio Services Division, designated for hearing the mutually exclusive applications of Lexington Communications, Ltd. (Lexington), Standard Broadcasting, Inc. (Standard), Horace Edward Crapps, Jr. (Crapps) and Carolina Communications Limited Partnership (CCLP) for a construction permit for a new FM station on Channel 253A at Lexington, South Carolina. In addition to the standard comparative issues, the HDO designated "Sonrise" issues with respect to CCLP.[1]

2. On March 7, 1990, the Presiding Officer issued an Order granting a Motion To Dismiss filed by Crapps. CCLP did not file a notice of appearance and an Order released April 2, 1990, dismissed the application of CCLP with prejudice, thereby effectively mooting issues 1 through 3 in the HDO.

3. A prehearing conference was held in this proceeding on April 25, 1990. Subsequent to the prehearing conference, the Presiding Officer issued a Memorandum Opinion and Order, FCC 90M-1281 (released May 18, 1990) denying Lexington's Petition for Late Acceptance of Integration and Diversification Statement. Accordingly, evidence relating to Lexington's integration statement was not received into evidence. Tr. at 206-207.

4. Hearings were held before the Presiding Officer on July 23, 1990, concerning the comparative issue in this proceeding.

5. Subsequent to the initial hearing, the Presiding Officer issued a Memorandum Opinion and Order, FCC 90M-2399, (released August 6, 1990) granting Motions To Enlarge filed by Lexington on May 23, 1990 and July 20, 1990 respectively, and added the following issues against Standard:

> 1. To determine whether Standard Broadcasting, Inc. has prepared, filed and made available for public inspection materials required by Sections 73.3526 and 73.3615 of the Commission's Rules;
>
> 2. To determine whether Standard Broadcasting, Inc. made misrepresentations in its 1988 renewal application; and
>
> 3. To determine whether Standard Broadcasting, Inc. made misrepresentations in its June 4, 1990 and July 20, 1990 Oppositions to motions to enlarge issues filed by Lexington Communications, Ltd.
>
> 4. To determine, in light of the foregoing, whether Standard Broadcasting, Inc. possesses the basic qualifications to be a licensee.

The burden of proof on the added issues was placed on Standard. *Id.* at 3.

6. By Memorandum Opinion and Order, FCC 90M-3116, (released October 3, 1990) the Presiding Officer granted Lexington's third Motion To Enlarge filed on August 1, 1990, which sought to conform the issues to the evidence presented at the July 23 hearing. The Order concluded that "Lexington's pleading provides a *prima facie* showing warranting the addition of the requested issue," *Id.* at 1, and added the following issue against Standard:

> To determine whether Standard was lacking in candor and/or misrepresented facts respecting its ownership status and integration proposal; and if so, the effect of such conduct upon its basic qualifications to be a Commission licensee.

7. Additional hearings were held on November 13-14, 1990, addressing the issues added against Standard in the August 6, 1990 Order. No additional evidence was offered by Standard with respect to the last issue added. The record was closed on November 14, 1990. Proposed findings of fact were filed January 28, 1991; replies were filed February 22, 1991.

FINDINGS OF FACT

Qualification Issues

Standard Broadcasting, Inc.

8. Standard is a corporation organized under the laws of South Carolina with a single class of voting stock. Standard Ex. 1. Its principals are William C. Branham, who is President/Treasurer, a director and a 100% stockholder[2] and Arthur M. James, who is Vice President/Secretary and a director. *Id.*

9. Standard is the licensee of WLGO-AM, a daytime only AM station located in Lexington, South Carolina.

Public Inspection File - Section 73.3526

10. Section 73.3526 of the Commission's Rules specifies the contents of a station's public inspection file which must be made available to the public upon request. 47 C.F.R. ¶ 73.3526. Specifically, Section 73.3526(a)(9) provides that every commercial broadcast station must place in its public inspection file for each quarter "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." Lex. Ex. 6. Additionally, Section 73.3526 requires, among other things, that the file include a copy of every ownership report and a copy of *The Public and Broadcasting, A Procedural Manual*. 47 C.F.R. ¶¶ 73.3526(a)(3) and (a)(6); Lex. Ex. 6.

11. Following the designation of this proceeding for hearing, but prior to May 3, 1990, Lawrence Bernard, Counsel for Standard, telephoned Standard's President, William Branham, to inquire whether Standard's WLGO-AM public inspection file was in order. Tr. 240-41. Branham responded that "so far as I know they are, I will call Mr. James." Tr. 241. As soon as he hung up with Bernard, Branham called James and asked him to check the files to see if "they are correct and up to date." Tr. 242-243.

12. Branham assumed that if the files were not correct, it might have an adverse impact on this proceeding. Tr. 243. However, he never followed up with James to ensure that the files were in fact up to date, Tr. 243, Branham made no independent effort to check the public inspection file for compliance with the Commission's Rules. *Id.* Branham testified that he had "checked" the public inspection file in the past, but when asked if there was any material in the file in addition to the problems and program list for which he would be looking, he replied, "I don't know of anything. Tr. 235-236.

13. Arthur James claimed responsibility for the maintenance of WLGO's public inspection file. Lex. Ex. 8; Tr. 231, 291-292. Despite the continuing nature of this responsibility, James testified that he reviewed the Commission's Rules concerning the public inspection file in 1983, but not again until asked by Branham to check the file in April of 1990. Tr. 294, 297-298. Additionally, James did not keep a list of the materials that were to be included in the file. Tr. 292. He erroneously believed that if he included all materials sent to the station by the Commission, that would be sufficient to comply with Commission rules. Tr. 293. James did not maintain the file in any particular order, but rather, documents were simply dropped in anywhere. Tr. 310.

14. Despite the fact that James thought that it was a "foregone conclusion that someone from Lexington would be coming by to check [the public inspection file]," Tr. 295-296, 321, 338, he was concerned only that it be perfect "within reason," and that it be "easily handled, dealt with, accessed, studied . . . " Tr. 296. When asked if he had read through the rules to determine if the file was in compliance, James stated that he had "read hurriedly, not in the sense of sit down and study for examination." Tr. 297. He admitted that he was not aware of the requirement that the file include the procedural manual, Tr. 298, and did not check the file to see whether every ownership report required to be in the file was in fact included. Tr. 299.

15. Although maintenance of the public inspection file was the responsibility of James, Branham claimed that he checked the file "from time to time" to see if it was correct and up to date. Tr. 231, 233. Contrary to James' testimony that the file was not maintained in any particular order, Branham testified that when he reviewed the file each January and at other times during the year, the program lists for each year were kept together, and that he would have had a hard time checking the file if they were not grouped together. Tr. 235.

16. On May 3, 1990, Lexington's representative, Johnnette Murray, a paralegal at the law firm of Fullwood and Fullwood, Tr. 457, visited the studios of Standard's WLGO-AM in Lexington, South Carolina. Lex. Ex. 10. Lexington's counsel, Mr. Freeman, had given her a checklist of materials that were required to be placed in a public inspection file, and upon her arrival, Ms. Murray asked to review WLGO's public inspection file. Tr. 459. Ms. Murray was given a folder labeled "Public Inspection File" which she then proceeded to carefully review. She compared the actual contents of the file to the checklist of materials that are required to be included in such files supplied by Freeman. Tr. 458-460, 468; Lex. Ex. 10.

17. On May 3, 1990, WGLO's public inspection file was not complete. Lex. Ex. 10. Specifically, the file lacked Program Lists for the third and fourth quarters of 1985, the third and fourth quarters of 1987, and all of 1988, 1989, and 1990. Lex. Exs. 10 and 12. Additionally, the file contained no ownership reports or certifications subsequent to 1987, and the *The Public and Broadcasting - a Procedure Manual* was missing from the file. Lex. Ex. 10.

18. Following her review of the file, which lasted approximately an hour, Ms. Murray asked James if she could use the copy machine. Lex. Ex. 8, Declaration at 2; Tr. 460. He agreed and told Ms. Murray that there would be no charge for the copies. Tr. 460. Ms. Murray then proceeded to copy materials from the file including all of the program lists and ownership reports contained therein. Tr. 465-466. Ms. Murray was not in a hurry to complete the copying and was trying to be very careful. Tr. 492. When she completed the copying, she left the station and returned to Fullwood and Fullwood. Tr 467. Upon her return she reviewed the materials that she had copied and her notes with Michael Fullwood. Tr. 467-468. Together, Ms. Murray and Fullwood prepared a letter to Freeman discussing her findings. Tr. 468. This letter, and a copy of all of the materials she had copied from the public inspection file were then faxed to Freeman's office on May 3, 1990. Tr. 469; Lex. Ex. 10.

19. Standard has conceded that its Program Lists for 1988, 1989, and 1990, its Ownership Report for 1989[3] and Procedural Manual were missing from its public inspection file on May 3, 1990. Standard's Opposition to Motion to Enlarge Issues at 4, 6 (filed June 14, 1990). Standard denies, however, that the Program Lists for the third and fourth quarters of 1985 and 1987 were missing at that time, Tr. 325, and has stated that its Ownership Certification for 1988 was in the file, Lex. Ex. 8 at 3; Tr. 326, although James does not recall placing the 1988 certification in the file. Tr. 161. In an effort to explain the absence of the 1988-1990 Program Lists, Standard initially stated that James removed the lists from the file to check them for accuracy against the station logs. Lex. Ex. 8 at 2.

20. Shortly after Lexington's Motion To Enlarge Issues (filed May 23, 1990) raised the allegations concerning the missing documents, James discussed the matter with

counsel for Standard. With respect to the missing 1989 Ownership Report and the Procedural Manual, counsel told James he would handle the matter. Tr. 299. When James did not receive the materials (*i.e.*, the 1989 ownership report and the FCC procedural manual) from counsel to include in the files, James did not follow up in an effort to complete the file. Tr. 301. Despite Lexington's Motion to Enlarge, Standard's pattern of carelessness did not improve and it failed to file with the FCC its 1990 ownership information due on August 1, 1990, until November 9, 1990. Standard Ex. 20. As of the November 13, 1990, hearing in this proceeding, neither the 1989 ownership report, the 1990 ownership certification, nor the procedural manual had been placed in WLGO's public inspection file. Tr. 256, 299-300. Moreover, the 1988 letter certifying that Standard's ownership remained the same as had been reported in the 1987 report was false and no corrected report has been placed in the public file.[4] In addition, the evidence indicates that at least some of the quarterly lists were not timely placed in the public file but were created in May of 1990.

Ownership Reports - Section 73.3615

21. Section 73.3615 of the Commission's Rules requires that each licensee of a commercial AM station file an Ownership Report on FCC Form 323 once a year, on the anniversary of the date its renewal application is to be filed. Lex. Ex. 7. Alternatively, a licensee may file a certification with the Commission indicating that it has reviewed its current report and that it remains accurate. *Id.*

22. Pursuant to Section 73.3615, Standard is required to file its annual ownership report or certification on August 1 of each year, the anniversary of the date on which its renewal application is to be filed pursuant to Section 73.3539 of the Commission's Rules.

23. Standard finally filed its 1989 ownership report with the Commission on November 9, 1990, over a year late. Lex. Ex. 16; Standard Ex. 19. As previously noted, the 1990 certification, due on August 1, was filed at the same time. Presumably, a copy of both the 1989 and 1990 filings have now been placed in the public file.

24. On June 29, 1988, Standard filed with the Commission a "Statement in Lieu of FCC Form 323" signed by Mr. Branham stating:

> I have examined our most recent Ownership Report filed with you, dated April 16, 1987. I hereby certify that all information contained therein remains unchanged and is currently true and accurate to the best of my knowledge.

Lex. Ex. 3.

25. Standard's 1987 Ownership Report dated April 16, 1987, indicated that Branham owned a 70% interest in Standard and James held a 30% interest in the company. Lex. Ex. 2. On or about August 17, 1987, James assigned his 30% interest to Branham. Standard Ex. 1; Tr. 42.

26. Branham admitted, however, that this certification was inaccurate because at the time he signed the 1988 ownership certification James had conveyed his 30% interest in Standard to Branham and had only an option to reacquire it sometime in the future. Tr. 48, 177. Despite the explicit representation in the letter that Branham had reviewed the 1987 ownership report, he testified that he had no recollection of reviewing the 1987 Ownership Report prior to signing the 1988 Certification, Tr. 264, stating that "Mr. James brings these documents to me, he prepares them and brings them to me and says, this is so and so and I want your signature here." *Id.* No correction to the 1988 ownership report has ever been filed with the Commission, Tr. 257, and, obviously, no corrected report placed in the public file. The first time the present ownership structure of Standard was reported to the Commission was in Standard's Integration Statement filed March 12, 1990. Tr. 76. Standard's FM application was not amended to reflect the new ownership structure until May 11, 1990, Tr. 76, two and one-half years late. *See* 47 C.F.R. ¶ 1.65.

Misrepresentations In Standard's 1988 Renewal Application

27. On July 7, 1988, Standard filed its application for the renewal of WLGO's license signed by James on May 30, 1988. Lex. Ex. 5. As part of that application, Standard certified that the documentation required by Section 73.3526 had been placed in the station's public inspection file at the appropriate times. Additionally, the application represents that Standard's Ownership Report had been filed with the Commission as required by Section 73.3615 of the Rules.

28. Branham stated that he reviewed the application for renewal, and that it appeared to be correct. Tr. 259. He did not make any effort to check the representations in the application, but stated that James "did all of that." Tr. 259-260.

29. The renewal application was prepared by James. Tr. 168, 302. He did not review Section 73.3615 of the Commission's Rules prior to certifying that Standard was in compliance with that provision, but just filled in the positive response. Tr. 304. He did not know whether or not the ownership report was required to be filed at the time the renewal was filed, but "was merely relying on the fact that I had returned what had been sent to me." *Id.* Further, when asked whether he knew if an ownership report had in fact been filed, James stated, " . . . I have no idea." Tr. 172.

30. As discussed above, neither Branham nor James were familiar with the public inspection file requirements of the Commission. Despite this unfamiliarity, James had not reviewed the requirements of the rules since 1983, but nevertheless prepared the renewal application certifying that the station was in compliance with those requirements, Lex. Ex. 5, even though the public file did not contain all of the required program lists or other materials, and the ownership certification was significantly inaccurate.[5]

Misrepresentations In Pleadings

31. On May 23, 1990, Lexington filed a Motion to Enlarge Issues with the Commission seeking the addition of issues relating to Standard's public inspection file and ownership rule violations and the misrepresentations in its 1988 renewal application. In response to Lexington's Motion, on June 15, 1990, Standard filed and Opposition, including a Declaration of James dated June 13, 1990. Lex. Ex. 8.[6]

32. In his Declaration, James attempted to explain why the Program Lists for 1988, 1989, and 1990 were missing from WLGO's public inspection file when it was in-

spected by Ms. Murray on May 3, 1990, ignoring Lexington's allegations that the lists for the second half of 1985 and 1987 were also missing. James stated that a week or so prior to Ms. Murray's visit to the station, Branham informed him that Standard's Washington counsel, Bernard, had asked if WLGO's public inspection file was in order. Lex. Ex. 8. James "assumed from this inquiry that counsel might wish to use our programs-problems lists in conjunction with the hearing on Standard's FM application." *Id.*[7] James claimed that "a day or two" before Ms. Murray's visit on May 3, 1990, he removed the 1988, 1989, and 1990 Program Lists from the file to check them against program logs for accuracy of dates and times of program broadcasts. *Id.* Nothing in James' Declaration reflects any concern over the legibility or neatness of the reports or any suggestion that he had copied them over in addition to checking them for accuracy.

33. As stated above, Ms. Murray visited the station on May 3, 1990, and requested the public inspection file. Although Bernard had called a week earlier and asked if the public inspection file was in order, and James thought it was a "foregone conclusion" that someone from Lexington would likely inspect the file in connection with Standard's application, Tr. 295-296, in providing Ms. Murray with the file, James did not give her the Program Lists that he was allegedly reviewing or tell her that he had extracted those materials from the public file. Tr. 458-460; Lex. Ex. 8 at 2. Subsequently, after reviewing the file for "about an hour," Ms. Murray asked to and was permitted to make copies of the documents in the file Lex. Ex. 8 at 2. Only at this time, did Ms. Murray indicate to James that she was a student at Midlands Tech, a local community college. *Id.*; Tr. 461; Standard Ex. 9 at 2. In his Declaration, James stated that

> prior to Ms. Murray's visit students at the University of South Carolina had come to our studios and asked to see the public file as part of their course work,

Lex. Ex. 8 at 2,[8] and claimed that he believed that Ms. Murray also was inspecting the file as part of a class assignment, Tr. 459-460, and he did not provide Ms. Murray with the Program Lists for 1988, 1989, and 1990 allegedly in his office because he "thought Ms. Murray had been provided with examples of every type of document normally kept in a station's public file." Lex. Ex. 8 at 2-3. James did not ask Ms. Murray if she needed any other materials or if the materials that she found were satisfactory for her purpose. Tr. 463. James' explanation, moreover, does not account for his failure to explain that documents had been removed from the file when Ms Murray first requested it.

34. Ms. Murray returned to WLGO on June 18, 1990 at the request of counsel for Lexington to reinspect the station's public inspection file. Lex. Ex. 11. At that time, the file contained the program lists that had been missing from the file on May 3, *i.e.*, the third and fourth quarters of 1985 and 1987 and all of the lists for 1988, 1989 and 1990. *Id.* Ms. Murray inquired as to whether she was given the entire public inspection file and was informed that she had been. *Id.*; Tr. 465. The file that was given to Ms. Murray still did not contain ownership reports or certifications for 1988 and 1989 or the FCC procedural manual as required by the Commission's Rules. Lex. Ex. 11.

35. Ms. Murray again reported her findings to counsel for Lexington who then requested that she return to WLGO for yet a third time. *Id.* Specifically, Ms. Murray was asked to look for similarities in the ink and paper of the program lists that were in the file on June 18, 1990, but which were not in the file when she initially inspected it on May 3, 1990. *Id.*

36. Ms. Murray returned to WLGO for the third time on June 21, 1990. *Id.* James provided her with the public inspection file when she requested it. *Id.* Ms. Murray once again examined the documents contained in the file and found that the third and fourth quarters of 1985 and 1987 and the lists for 1988, 1989, and 1990 were completed with several different inks and on different types of paper. *Id.* However, when she held the documents up to the light, she discovered that there were impressions of words that were identical to words on other lists contained in the file. Specifically, Ms. Murray discovered identifiable impressions from the first page of the fourth quarter of 1988 on the list for the first quarter of 1989; and the fourth quarter 1989 list contained impressions from the first page of the third quarter of 1989. *Id.*

37. Based on Ms. Murray's findings, Lexington filed a second Motion to Enlarge Issues against Standard alleging that Standard's Opposition to Lexington's initial Motion to Enlarge Issues and the Declaration of James attached thereto contained misrepresentations concerning the preparation of the program lists that were contained in WLGO's public inspection file. Lexington Motion to Enlarge Issues, filed July 6, 1990. Standard filed its Opposition to Lexington's second Motion to Enlarge Issues on July 23, 1990. Attached to Standard's Opposition was a second Declaration of James. Lex. Ex. 9.[9]

38. In his second Declaration, James revises his explanation of why several of the lists were missing from the public inspection file when it was first reviewed by Ms. Murray. Whereas he originally explained that he had removed several of the lists to compare them for accuracy against the station logs, Lex. Ex. 8 at 2, James in his second Declaration dated July 20, 1990, states that he recalls

> finding a few errors and some illegible handwriting on the lists during my review. In those instances, I made the corrections on the existing lists, then copied over the entire document over again in my own handwriting and disposed of the old lists on which I had made the corrections.

Lex. Ex. 9 at 2. As noted above, no mention of the fact that James had copied over any of the lists or that he had thrown away original lists was made in his prior Declaration of June 13, 1990, which sought to explain away the fact that the lists were missing from the file.

39. Consistent with Ms. Murray's findings, James additionally stated in his July 20, 1990 Declaration that in May, 1990, he copied over the lists for the fourth quarter of 1988 and the third quarter of 1989, and that "to the best of my knowledge none of the other 23 lists in the file were copied in May of 1990." Lex. Ex. 9 at 2. James explained that he did not remove any documents other than the Program Lists from the public inspection file for review because he considered the lists to be "something very personal for me. . . ." Tr. 313-314.

40. At hearing, James revised his earlier statement that he had removed the lists from 1988 to 1990, and indicated in his written testimony that he was not sure which lists had been removed from the file. Lex. Ex. 8. On cross-examination, he claimed that he removed the program lists for "somewhere from 1987 forward." Tr. 315.[10] When asked if he had any reason for taking one date rather than another from the file, James responded, "none whatsoever." Tr. 318. He stated that he felt the need to review the more recent lists for accuracy, as opposed to all of the lists because, "back in those earlier years, my physical and mental condition I felt were much better." Tr. 319.

41. James claims that after he removed the lists from the file, he placed them in a manila folder and took them into his office. Tr. 330. He then brought the program logs into the office and determined which logs corresponded to the lists that he had removed. Tr. 331. Once the relevant logs were pulled, James "spot checked" the program lists. Tr. 335. James testified that the lists that he reviewed contained no errors, Tr. 321, although in his Declaration of July 20, 1990, he stated that the lists that were reviewed and compared against the logs were found to have "errors or unintelligible handwriting." Lex. Ex. 9 at 2. When he completed checking the lists, against the logs, James reexamined each list that he had removed for neatness, Tr. 336, and now claims to have copied over "at least two, probably more" of the lists, Tr. 337, although in his Declaration of July 20, 1990, he claimed to have copied over only the lists for the fourth quarter of 1988 and the third quarter of 1989. Subsequently, James admitted that in addition to these two lists, he had also "recopied" the list from the fourth quarter of 1987. Standard Ex. 9 at 1.

42. Although Branham requested that James check the public inspection file, Tr. 241, they never discussed that James was checking the program lists against the logs, nor did James ever report his findings with respect to the public inspection file. Tr. 333. Branham testified that despite the fact that he and James shared an office, he did not see James checking the file, nor did he notice the pile of logs which James allegedly had brought into the office. Tr. 243-244. Further, Branham testified that he did not see James recopying the lists. Tr. 252.

43. In describing the procedure he followed when copying the lists, James explained that he had a manila folder on the left side of his desk containing all of the program lists that he removed from the public inspection file. Tr. 341, 373. He opened the folder, placed the list that was to be recopied on top and copied it over onto a clean sheet of paper. *Id.* There were no papers scattered on the desk. Tr. 341-342. However, when asked to explain how the indentations (discussed more fully below) appeared on the lists, James stated that there was "one there and I put another piece of paper on top of it and wrote over it." Tr. 342. The "one" that James refers to is not blank paper, but rather, a list that had been, according to James, timely prepared. Tr. 372. This explanation conflicts with his prior statement that all of the lists were in the manila folder.

44. James testified that he recopied the lists for no other reason than neatness, Tr. 377, and felt that the lists that he chose to copy over were far worse than the other lists that he removed from the public inspection file to review. *Id.* Although James claimed he was recopying the lists to make them more legible, when asked to compare the list from the fourth quarter, 1987, which James admitted to copying over, with the lists that were *not* recopied, James concluded that the ones that were not recopied were neater than the recopied list. Tr. 383. Further, despite his concern with the neatness of the lists, James did not consider typing them, although he used a typewriter regularly for correspondence. Tr. 368, 386.

45. After James copied over the lists, he threw away the originals. Tr. 338. He did not confer with anybody, not counsel and not Branham, as to whether disposing of the original lists was an appropriate action, even though it was the request of counsel and the pending litigation that caused him to review and, allegedly, copy over the lists in the first place. Tr. 338, 384-385.

46. In an effort to determine the dates on which the program lists were prepared, both Lexington and Standard had document experts examine the lists. On behalf of Standard, Richard L. Brunelle reviewed the documents. *See* Standard Ex. 8. Brunelle concluded that 13 of the documents were suitable for relative age comparison tests which reveal whether documents were written at the same or different times based on the level of dryness of the ink. *Id.* at 4. It has been stipulated that inks dry rapidly at first, then more slowly, and that the speed of drying is affected by environmental factors and the type of paper. Brunelle assumed that all of the documents were stored under similar conditions. Joint stipulation at 1. Brunelle first grouped the documents by type of ink so he could compare them. Standard Ex. 8 at 4. Brunelle's tests show only that the documents with the same ink were written at the same or at different times. They do not enable him to state which documents were written first and which later. Joint Stipulation at 2. As a result, for example, documents bearing dates of 9/30/87 and 6/30/88 which had different levels of dryness could have been written on the dates indicated, the 9/30/87 document could have been written in 1989 after the 6/30/89 document, or both could have been written on entirely different dates than those indicated on the documents so long as they were not written within a few months of each other. Of the 13 documents lists in the report, Brunelle concluded that three documents, the program lists for the fourth quarter of 1987, fourth quarter of 1988, and third quarter of 1989, were prepared at the same time. Standard Ex. 8 at 5. As to the others, he could only say that they were consistent with "having been written on the dates appearing on them." *Id.* Unfortunately, as shown above, the dryness test used is also "consistent with" any number of other possibilities.

47. While Brunelle can apparently tell whether documents using the same ink were prepared at the same or different times, it appears from his report that 11 different inks were used on the documents examined, and Brunelle's report does not indicate (other than for the three documents found to have been prepared at the same time) which of the documents he studied were written with the same ink so that his results could be evaluated. For example, documents using the same ink dated 1984 and 1988 with different degrees of dryness would be consistent with having been written on the dates indicated, but would be equally consistent with the 1988 document having been written in May of 1990.

48. On behalf of Lexington, James T. Miller also examined the documents. Miller's examination included review of the handwriting, paper, inks, format, indentations, staple marks, paper clip impressions, and signs of wear and

tear, and utilized various magnifying and lighting devices, as well as short and long range ultra violet light. Lex. Ex. 21.

49. Miller's examination suggested that most of those lists from 1988-1[11] and earlier could be physically distinguished from those from 1988-2 and later. As to the former group, he noted that many headings were written with a different pen and probably had been added later and that some of the lists bore indentations from others. As to the latter group of documents beginning with 1988-2, Miller noted, *inter alia*, that they were on clearer, newer paper with an optical brightness not seen in the first group, and that each individual document appeared to have been written with a single pen, including headings and dates, unlike the first group. Lex. Ex. 21 at 2. With respect to the indentations, Miller confirms Ms. Murray's observations and expands the list of documents with indentations from other documents. Lex. Ex. 21 at 2. The following table illustrate his findings relating to the second group of documents:

List	Indents on	List
?		1988-2
1988-3		1988-4
1988-4		1989-1
1989-1		1989-2
1989-3		1989-4

Brunelle found that 1987-4, 1988-4, and 1989-3 were written at the same time, and Miller did not dispute this. Based on the experts' findings, it is apparent that if 1988-4 was actually written in May of 1990, as Standard concedes, Standard Ex. 8 at 1, the 1988-3 must list have been written at the same time because impressions from it are found on the 1988-4 list. If 1988-3 was actually written in May of 1990, then 1989-1 was also written then since its ink was of the same type and dryness as that on 1988-3 as reflected in the table in the Joint Stipulation. Thus, the evidence of Standard's expert combined with Miller's findings indicate that, at a minimum, the lists for 1987-4, 1988-3, 1988-4, 1989-1, and 1989-3 were all prepared in May of 1990, not just the three lists which James concedes he prepared at that time. Standard Ex. 8 at 3. In addition, Miller has found that the lists for 1989-2 and 1989-4 bear indentations from lists prepared for the preceding quarters which were actually prepared in May of 1990, a good indication that 1989-2 and 1989-4 were also prepared in May of 1990.

Misrepresentations Concerning Standard's Ownership Status And Integration Proposal

Ownership

50. Standard filed its application in this proceeding on June 24, 1987 and certified that Branham held a 70% interest in Standard and that James held a 30% interest. Standard filed an amendment to its application on May 11, 1990, reporting that Branham had acquired James' interest in Standard. As stated above, Branham actually acquired that interest in August of 1987, shortly after Standard's application was filed. Standard did not, however, report to the Commission that James retains an option to reacquire his interest in Standard until the November 9, 1990 filing of its 1989 ownership report. Tr. 178; Lex. Ex. 18, 19. At hearing, both Branham and James testified that James does in fact hold an option to repurchase his stock at any time. Tr. 48, 177.

Integration Proposal

51. Pursuant to the Presiding Officer's Order of February 26, 1990, on March 12, 1990, Standard filed its Integration and Diversification Statement (Integration Statement), signed by Branham. Lex. Ex. 4. In its Integration Statement, Standard claimed that Branham would work full time (at least 40 hours per week) at the station and would be general manager. The Integration Statement provides that "Mr. Branham will fully withdraw from his current employment" and that

> while he does not intend to divest himself of any other business interests, he will curtail the time that he currently devotes to such interests so that no time will be devoted to such business on weekdays.

Id. at 2. Additionally, Standard claimed qualitative integration credit based on the local residency and civic activities of Branham. *Id.* at 2. Further, Standard stated that it would claim a daytime preference for its operation of WLGO. *Id.*

52. Subsequent to the filing of its Integration Statement, Standard retracted all of its claims for qualitative enhancements to its integration credit, with the exception of its claim for a daytimer preference. As stated above, in its Integration Statement, Branham set forth a proposal to reduce his current employment hours and other business activities. Additionally, he disavowed any intent to divest these other business interests. However, in its direct case, Standard states that "on or before January 1, 1991, Branham plans to transfer all of his interests in these two businesses . . . " Standard Ex. 2 at 1. Branham's testimony indicates that he had formalized his intent to transfer his business interests prior to the filing of the Integration Statement which disavows any such intent. Tr. 97. Further, Branham testified that he does not devote any time to his other business interests, Tr. 96, 98, despite his representation in the Integration Statement that he will "curtail the time he currently devotes to such interests." *Id.* Lex. Ex. 4 at 2.

53. Although Standard's Integration Statement provides that it will seek credit for Branham's local residency, at his deposition and at hearing, Branham admitted that he in fact does not reside within the 1mV/m contour of the proposed station. Tr. 102.

54. Additionally, in its Integration Statement, Standard claimed credit for Branham's civic activities. At hearing Branham testified that he is not involved in any civic activities, and that the representation otherwise in the Integration Statement was wrong. Tr. 101.

55. Branham testified that he assumed he reviewed the Integration Statement, and that it is his normal practice to review a document such as the Integration Statement carefully to see if the facts were correct. Tr. 87-88. Further, Branham could provide no explanation for how so many misstatements were included in the Integration Statement. Tr. 104.

Standard Comparative Issue

Standard Broadcasting, Inc.

Integration

56. Standard is claiming integration credit based on its representation that Branham will work full time (at least 40 hours) at the proposed station as its General Manager. Standard Ex. 2. According to Standard, Branham will "establish all station policies, including entertainment formats, advertising rates, budgets, and size of staff." *Id.* Branham will also, according to Standard's representation, "supervise the day-to-day operation of the station, including advertising sales, promotion and programming." *Id.* Although James serves as General Manager of WLGO, he would have a very limited role at the FM station according to Branham. Tr. 120.

57. Branham alleged that he "has devoted between 30 and 40 hours per week to WLGO over the past several years," Standard Ex. 2 at 2, but he has no title at the station and draws no salary. Tr. 26-27. Branham's primary function at the station has involved engineering. Tr. 230. He claims to spend an hour a day doing engineering, Tr. 28, and about 2-3 hours a week listening to the music that comes into the station. Tr. 29, 32. Additionally, Branham testified that he spends 2-3 hours a week "watch[ing] the financial system," Tr. 31, 34, which he defined as "check[ing] on the checks that comes in, the late accounts . . . (sic)" Tr. 33. When asked if there is anything else that he does at the station on a regular basis, Branham responsed, "I talk with employees." Tr. 29.[12] When questioned about Branham's responsibilities at WLGO, James testified that Branham plays no role in the news and public affairs programming of the station, Tr. 182, nor does he have anything to do with the station's bookkeeping functions. Tr. 184. James further testified that other than Branham's engineering work, he could not recall any specific responsibilities of Branham's at the station. Tr. 186-187.

58. Branham indicated that he arrives at the station at approximately 9:00 each weekday morning (and sometimes on Sunday) and that he typically goes home at about 1:00. Tr. 34. On days when James does not work, Branham stays until about 3:00-4:00. Branham and James share an office at the station, Tr. 184; however, James testified that Branham does not have a chair at his desk and if he wants to sit down, he uses James' chair. Tr. 332.

59. When questioned about the preparation of the application in this proceeding, Branham indicated that James prepared the programming statement portion of the application because James "has past experience in broadcasting and he would be more capable of doing that." Tr. 58-59. Further, Branham testified that at WLGO he has done "hardly none" of the programming besides the recording of music because James is "better," Tr. 112, and that James does the bookkeeping at the station. Despite the fact that James is the General Manager of WLGO and that as such he is responsible for running the station, Branham testified that he and James never discussed the role that James would play at the FM station, Tr. 117, but that they had a general understanding that James would run the AM and that Branham would run the FM.

60. In its direct case, Standard stated that the AM and FM stations would be operated jointly. Standard Ex. 2 at 2. However, at hearing, Branham testified that the stations would be operated separately, although located in the same building. Tr. 117-125. According to Branham, the only role that James will play at the FM will be broadcasting the news. Tr. 120.

61. As discussed above, until August of 1987, two months after Standard filed its application in this proceeding, James held a 30% interest in Standard. On May 11, 1990, Standard filed an amendment to its application reporting that Branham has acquired James' interest and thereby held a 100% interest in Standard. What Standard did not report until it filed its Integration Statement, however, was that James continues to hold an option and may reacquire his 30% interest at any time.

Daytimer Preference

62. Standard seeks the award of a daytimer preference based on its operation of WLGO since December 1983. Standard claims that Branham, who until August 1987 held a 70% interest in Standard and subsequent to that time has held a 100% interest, has participated in WLGO's operations to a significant extent since WLGO began operations. Standard Ex. 3.

Diversification

63. Standard is the licensee of WLGO-AM at Lexington, South Carolina. Standard has certified that within three years of the start of operations of the proposed FM station, Standard and its principals will divest all of their interests in and association with WLGO. Standard Ex. 4.

Auxiliary Power

64. Standard proposes to install auxiliary power generators at its studio facilities and its transmitting facilities so the station can continue operations in the event of an interruption on power supply. Standard Ex. 5.

Lexington Communications Ltd.

Structure of the Applicant

65. Lexington is a South Carolina limited partnership in which there are two general partners, C.T. Reynolds and Lewis McGee Dubose, each holding a 10% ownership interest in the partnership. Lex. Ex. 1 at 1. Limited partners hold the remaining 80% interest in the Partnership. *Id.* Each of the general partners has an equal vote in the Partnership, and thus, in the affairs of the applicant. *Id.*

Diversification

66. Neither Lexington nor any of its general partners have any ownership interest in any medium of mass communications. *Id.* at 2. One of the general partners, Reynolds, is currently employed as the General Manager of WBLR at Batesville, South Carolina. *Id.* However, as provided in Lexington's application, Reynolds proposes to leave that position in the event of the grant of Lexington's application. None of the limited partners holds an attributable interest in any media of mass communications. *Id.*

Auxiliary Power

67. Lexington proposes to have a complete auxiliary power system at its transmission facility and studio so that the station can continue to broadcast in the event of an emergency. Lex. Ex. 1 at 2.

CONCLUSIONS

Qualification Issues - Standard

68. The record evidence reflects a pattern of conduct by Standard which is so egregious that its application for a new FM station must be denied. In its *Character Policy Statement, Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209, 59 RR 2d 801 (1986); *recon. denied* 1 FCC Rcd 421, 61 RR 2d 619 (1986); *mod* 5 FCC Rcd 3252, 67 RR 2d 1107 (1990) ("Character Policy Statement"), the Commission stated that the relevant character traits with which it is concerned are those of truthfulness and reliability. In determining whether an applicant is reliable, the Commission further stated:

> We find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules as possibly predictive of future conduct and, thus, as possibly raising concerns about the licensee's future truthfulness and reliability. . .

Id. at 1209-1210.

69. Standard's rule violations include failure to timely amend its FM application to reflect changes in its ownership and the existence of an option; failure to timely file proper ownership reports in 1988, 1989, and 1990; and failure to comply with the requirements of Section 73.3526 relating to its public inspection file. The failure to properly keep and maintain issues/programs lists is particularly significant since such information is critical for the public to be in a position to evaluate a station's performance. *Office of Communications of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985); *Deregulation of Radio*, 104 FCC 2d 505 (1986); *KPRS Broadcasting Corp.*, 54 RR 2d 1397 (1983). These violations assume even greater significance due to Standard's failure to promptly take corrective action even after it was put on notice.

70. The repeated pattern of rules violations in which Standard has engaged and its failure to take prompt corrective action clearly demonstrates that it cannot be considered reliable. Rather, its rule violations indicate a propensity for such conduct in the future. *See Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *rev. denied*, 5 FCC Rcd 940, *recon. denied*, 5 FCC Rcd 4597 (1990). Standard's assertion that its public file and reporting violations are inconsequential, is meritless. Reporting failures where, as here, there is evidence reflecting numerous and serious violations, justify Standard's disqualification.[13]

71. Moreover, in addition to its serious rule violations, Standard's repeated misrepresentations demonstrate its propensity for untruthfulness with the Commission. The Commission's "scheme of regulation rests on the assumption that applicants will supply the Commission with accurate information" and that "[d]ishonest practices threaten the integrity of the licensing process . . . ." *Character Policy Statement, supra*, 102 FCC 2d 1210. Absolute truth and candor is a basic duty of applicants. The Commission views "misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust" I.D. at 1211. Such misconduct has consistently disqualified applicants. *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied* 456 U.S. 927, 457 U.S. 1119 (1982); *See Island Broadcasting Corp. of S. C. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980); *Chaconas v. FCC*, 486 F.2d 1314 (D.C. Cir. 1973); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). The record is replete with examples where Standard and its principals have made material misrepresentations and have been less than candid with the Commission. Standard's disqualification is mandated.

72. Standard represented in its 1988 ownership certification that the information contained in the 1987 report remained unchanged. The representation was false since, contrary to the certification, the ownership of Standard had changed since the 1987 report. Branham had acquired James' 30% interest subject to an option by James to reacquire it. The letter certification was doubly false in that it explicitly represented that Branham had reviewed the 1987 ownership report in determining there was no change. Branham testified that he did not review that report. Tr. 264.

73. In its 1988 Renewal Application, executed by James, Standard certified that it was in compliance with Sections 73.3526 and 73.3615 of the Commission's Rules. However, the certification in Standard's 1988 renewal application that all required documents had been timely placed in the public file was false. The file did not contain the procedural manual, the 1988 certification or, as discussed below, at least some of the required issues/programs lists. Because the ownership certification was itself false, the renewal application falsely certified compliance with Section 73.3615 of the rules. The failure of Standard's principals to review the Commission's Rules prior to certification to determine what the rules require is but one example of their cavalier attitude toward the information they provide the Commission.

74. Standard also made repeated misrepresentations concerning preparation of its issues/programs lists. As discussed in the Findings, when inspected by Johnnette Murray, Lexington's representative on May 3, 1990, Standard's public inspection file did not include program lists for the third and fourth quarters of 1985 and 1987 nor did it include such lists for all of 1988, 1989 and 1990 as required by the Commission's rules. James' constantly shifting explanations, detailed in the Findings, made in an effort to explain away the missing lists, is not believable and is not accepted. Based on James' inconsistent declarations, the credible testimony of Murray, and the corroborating testimony of two expert witnesses concerning the time and sequence in which these lists were prepared, it is readily evident that James created these lists for the first time in May of 1990. Further, instead of candidly admitting its dereliction, Standard and its principals have resorted to furnishing false declarations in pleadings and untruthful testimony in a vain effort to escape culpability.

75. Finally, Standard's Integration Statement, signed by Branham and filed on March 12, 1990 in this proceeding, misrepresents Standard's entitlement to enhancement credit for the local residency and civic activities of its principal. Additionally, the integration statement contained misstatements concerning Branham's intentions with respect to the divestment of his other business interests, as well as the amount of time which he was then devoting to those interests. Although Standard subsequently disavowed its entitlement to local residency and enhancement credit, the misrepresentations in its integration statement cannot

be ignored. It is another in Standard's pattern of complete disregard for the accuracy of the information it provides to this Commission. *Mid - Ohio, supra.*

76. In sum, virtually all of Standard's submissions to the Commission, including its 1988 Renewal Application, 1988 Ownership Certification, Declarations in Oppositions to Motions To Enlarge, and its Integration and Diversification Statement contain significant false statements. Even at the hearing, Standard's principals were unwilling to be forthcoming about their many transgressions. Standard's willful and repeated misconduct requires its disqualification.[14]

Comparative Issue

Integration

77. Even if Standard were not to be disqualified as a result of its various transgressions, its proposal for the integration of Branham has been discredited[15] and therefore, Standard is not entitled to integration credit. Standard has represented that Branham plays a "significant role" in the operations of WLGO. However, the evidence indicates that in fact Branham has no specific responsibilities at the station and that he believes that James is more qualified than he in almost all aspects of running the station, except for engineering. In fact, Branham does not even have a chair at his desk, a fact which casts substantial doubt on the significance of his involvement at the station. While Branham spends substantial time at WLGO, he appears to be "hanging out," not working.

78. As Branham has limited experience in the management of the station and leaves almost all responsibility of running WLGO to James, it is highly doubtful that James would play no role in the management of the FM station especially since the stations will share offices and studios.

79. The Commission has repeatedly stated that integration credit is due only when "the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 (1990). Here, the integration proposal is unreliable and contains false statements. Standard bears the burden of proof that there is a reasonable likelihood that its integration proposal will be effectuated. Standard has not sustained its burden and no integration credit will be awarded.[16]

Diversification

80. Standard has no diversification demerit as it has certified that within three years of the commencement of operation of the proposed station, it will divest it ownership interest and will have no further association with WLGO-AM. Also, Lexington has no diversification demerit as it has certified that its General Partner C. T. Reynolds will have no further association with his current employer WBLR if its application is granted.

Auxiliary Power

81. Both applicants are entitled to slight enhancement credit for their auxiliary power proposals.

82. In summary, neither applicant receives a comparative preference. Standard and Lexington receive no integration credit. Also, neither applicant receives a preference under other comparative criteria. For the reasons discussed under the qualification issues, Standard must be disqualified. The application of Lexington, the only remaining qualified applicant, will be granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[17] the application of Lexington Communications, Ltd. for a construction permit for a new FM station on Channel 253A in Lexington, South Carolina IS GRANTED; and the application of Standard Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The Designation Order permitted comparative coverage evidence. However, Lexington and Standard stipulated the differences in service between their respective proposals is not decisionally significant in this proceeding. Joint Ex. 1.

[2] As discussed below, until it submitted its 1989 ownership report in November of 1990, Standard had never disclosed to the Commission the option held by Mr. James to acquire a 30% interest that he previously held in the corporation. The only mention of it has come in response to cross-examination and Standard's Opposition to Lexington's Petition to Enlarge Issues.

[3] As discussed in greater detail below, Standard's 1989 ownership report was not included in the public inspection file because it had never been prepared or filed with the Commission.

[4] Since the 1988 certification letter had been filed with the FCC, a copy presumably existed at the station, but not necessarily in the public file folder. Given the carelessness exhibited by Standard and the fact that James had not even noted the absence of the 1989 ownership report upon his review of the file, there is no basis for disputing Murray's findings that no such letter was in the file at the time of her first inspection.

[5] Standard's program lists do not conform to the requirements of the rules. In preparing the lists, Mr. James has employed a sampling technique encompassing programming for only a small portion of the preceding quarter rather than a list of the most significant programs aired during the quarter, as required by the rules. Tr. 285-286. *See Office of Communication of United Church v. FCC*, 779 F.2d 702, 713 (D.C. Cir. 1985). *See also* Deregulation of Radio, 60 RR 2d 789, 790 (1986).

[6] The Declaration is riddled with errors uncovered in the cross examination of James. In that Declaration, James stated that he had read Lexington's Motion to Enlarge and the attached affidavit of Johnnette Murray; however, at the July 23, 1990, hearing in this proceeding, James testified that he had not read Lexington's Motion. Tr. 190. James represents that the program lists were kept in a separate folder marked "Problems - Programs Lists" which was kept in a file cabinet with other public filed material when, in fact, the lists were mixed in with other material in a folder labeled "Public Inspection File." Tr. 348. James repeatedly stated that he had removed the 1988, 1989, and 1990 lists but he later acknowledged that he could not be sure which lists he removed and thought it was "somewhere from 1987 forward." Tr. 315, 349. Finally, James omits all reference to any concern with neatness or recopying the lists

even though that seems to have been the major task he performed. Tr. 350, 354. James also testified that he only "skimmed" (*i.e.*, reading every third line or so), the Declaration before signing it. Tr. 347.

[7] At another point, James claimed that he was reviewing them because he believed that someone from Lexington would be coming to inspect them. Tr. 296, 321, 338.

[8] At hearing, however, James testified that only two students had previously requested to view the station's public inspection file, and although he could not remember the exact date of those visits, James stated that they were prior to 1986. Tr. 352.

[9] James explained that his second Declaration, dated July 20, was prepared and reviewed in the same manner as his earlier Declaration. Tr. 358-359. In his second Declaration, James stated that most of the lists in the file were prepared on the same type of paper. Lex. Ex. 9 at 1. However, when questioned, James admitted that in fact, many lists were prepared on different paper. Tr. 359-360. Further, contrary to his statement in his Declaration, Lex. Ex. 9 at 2, James stated that the program lists which he reviewed did not contain errors. Tr. 361. Indeed, in this Declaration James goes to great pain to try to demonstrate that only two documents had been "copied" noting that the other documents were with different inks and on different paper, contentions repeated by the experts' testimony. As discussed below, however, not two, but at least five lists were prepared in 1990, a difference of sufficient magnitude that it should not have escaped James' recollection so easily if his version of events were true.

[10] This, of course, supports Ms. Murray's report that the reports for the last half of 1987 (and 1985) were missing at the time of her inspection.

[11] Miller has identified the documents by reference to the year and the quarter (*e.g.*, "1" for January 1 through March 31) they purport to cover.

[12] The station has only three employees, James and two women. It has no sales staff and although Branham testified in July that two sales persons were to start the next week, Tr. 118-119, he testified in November that WLGO still had only the same three employees. Tr. 230.

[13] *Hampshire County Broadcasting Co., Inc.*, 57 RR 2d 463 (Rev. Bd. 1984) and *Valley Broadcasting Co.*, 66 RR 2d 600 (Rev. Bd. 1989); *rev. denied* FCC 90-23 (released January 1, 1990), cited by Standard does not support its position that the rule violations are inconsequential. In *Hampshire County*, the violations were not found to be disqualifying; there, the items missing from the public file involved several letters and application amendments, not the station's ownership reports or, as discussed, *above*, the critically important issues/programs lists. *Hampshire County* is no bar to the disqualification of Standard in light of Standard's more significant rule violations. Similarly in *Valley*, a renewal case, the rule violations appear to be of far less significance. Also, unlike Standard, the violations were corrected in a timely fashion. In this regard, in *Valley*, the Board recognized that reporting failures may warrant disqualification where there is evidence reflecting numerous and serious rule violations.

[14] Standard's characterization of its many false statements as unintentional and the result of carelessness finds no support in the record and is contrary to the evidence. Even if some elastic concept of carelessness could be stretched to fit Standard's pattern of misrepresentations, it would not help Standard. The degree of Standard's carelessness, if such it was, is so wanton, gross and callous, and in total disregard of its obligations to the Commission, as to be equivalent to an affirmative and deliberate intent. *See Tipton County Broadcasters*, 37 FCC 191, 2 RR 2d 1121, 1154 (1964); see also *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978).

[15] As discussed in the Preliminary Statement, Standard's late filed integration statement was not accepted.

[16] Assuming Branham's integration proposal was credited, Standard would only be entitled to 70% credit since James holds an option to reacquire his 30% interest.

[17] In the event exceptions are not filed within 30 days after the release of this Initial decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC LONG DISTANCE CORP.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY,
Defendant.

File No. E-90-441

ORDER

Adopted: December 4, 1991; Released: December 10, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 4, 1990, ACC Long Distance Corp. (hereinafter "ACC") filed the above-captioned formal complaint against New York Telephone Company (hereinafter the "Defendant") alleging, among other things, that Defendant's charges to ACC for certain T-1 circuits were unjust and unreasonable under the Communications Act, as amended. On December 4, 1991, however, ACC filed a motion to dismiss the complaint with prejudice stating that the parties had resolved all disputes with respect to the matters encompassed in the complaint.

2. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that ACC Long Distance Corp.'s Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: November 27, 1991; Released: December 10, 1991

By the Chief, Common Carrier Bureau:

1. On May 17, 1991, the Bureau released our Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established filing dates for each of the reports required from price cap LECs. On October 28, 1991, Oswayo River Telephone Company (Oswayo) filed a petition for waiver of some of the filing requirements for the December 31, 1991, quarterly service quality report. In this Order we grant that petition.

2. Oswayo is regulated under price caps because of its affiliation with Rochester Telephone, which elected this form of regulation. Oswayo petitions to be exempted from the trunk blockage report (Table III) in its December 31 quarterly report. Oswayo states that until October 7, 1991, its customers were served by an electro-mechanical switch which did not have the capability of measuring trunk blockage. Oswayo states that this switch has now been replaced with a digital switch that does have this capability, so that trunk blockage data is available from October 7, 1991, and will be filed in subsequent reports. Oswayo notes that this waiver request is the only request that will be made by the Rochester group (Rochester Telephone and 26 Tier 2 affiliates), and that grant of this waiver will not impact the Commission's ability to monitor LEC performance under price caps.

3. We find that Oswayo has made a timely filing, has narrowly defined its waiver request, and has shown good cause why it should be granted. We therefore grant Oswayo's request.

4. Accordingly, IT IS ORDERED that the request for waiver filed by Oswayo River Telephone Company in the above-captioned proceeding on October 28, 1991, IS GRANTED.

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-54

Amendment of Parts 21, 43, 74
78, and 94 of the Commission's
Rules Governing Use of the
Frequencies in the 2.1 and 2.5 GHz
Bands Affecting:

Private Operational-Fixed
Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution
Service,
Instructional Television Fixed
Service, and
Cable Television Relay Service

ERRATUM

Released: December 10, 1991

1. On October 25, 1991, the Commission released a *Second Report and Order* (FCC 91-302) in the above-captioned proceeding. This Order rectifies three omissions in the text of the revised Commission rules, as set forth in Appendix C of the *Second Report and Order*. First, the new rule specifying the interference analysis required of MDS applicants, § 21.902(i)(1), failed to include D channels as being subject to interference analysis. (The G channels were included.) Second, the MDS/cable cross-interest prohibition text as it applies to ITFS leases, Section 74.931, fails to include the limitation that it applies only in the absence of a competitive cable system. Third, the MDS/cable cross-interest prohibition, as it applies to ITFS leases, fails to include a rural exception.

Section 21.902(i)(1) of the Commission's Rules is revised to read as follows:

§ 21.902 Frequency interference.

* * * * *

(i)(1) For each application for stations in the 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz frequency bands filed on or after December 30, 1991, the applicant must submit an analysis demonstrating that operation of the applicant's transmitter will not cause harmful interference to any existing, cochannel and adjacent-channel D-channel, E-channel, F-channel, or G-channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized, with a transmitter site within 50 miles of the coordinates of the Multichannel Multipoint Distribution Service (MMDS) or MDS H-channel station's proposed transmitter site.

* * * * *

2. Section 74.931 of the Commission's Rules, as set forth in Appendix C of the *Second Report and Order*, is revised as follows:

§ 74.931 Purpose and permissible service.

* * * * *

(h) Except as specified in paragraphs (i) and (j), below, no licensee of a station in this service may lease transmission time or capacity to any cable television company either directly or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company, if the ITFS main transmitter station is within 20 miles of the cable television company's franchise area or service area, and if the cable television company is the sole provider of cable television service in the franchise area.

(i)(1) A cable television company shall be exempt from the provisions of paragraph (h) of this section if its franchise area contains none of the following:

Any incorporated place of 2,500 inhabitants or more, or any part thereof;

Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or

Any other territory, incorporated or unincorporated, included in an urbanized area.

(2) All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U.S. Department of Commerce, Bureau of the Census. In no event shall any statistics resulting from censuses prior to 1980 be used. The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part.

(3) If the cable operator's franchise area includes a rural part of an extended city, but includes no other territory described in this paragraph, an exemption shall apply.

(j) The provisions of paragraph (h) of this section will not apply to ITFS excess capacity leased directly or indirectly to cable operators or affiliates to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator or affiliate will be permitted to lease ITFS excess capacity equivalent to one MDS channel within 20 miles of the cable television franchise area or service area for this purpose, and, within 20 miles of the cable television franchise area or service area, no more ITFS excess capacity than the equivalent of one MDS channel may be used by a cable television company or affiliate pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Mass Media Bureau a cover letter explicitly identifying its

lessee as a local cable operator or affiliate and stating that the lease was executed to facilitate the provision of local programming. The first lease notification for an MDS or ITFS channel in an area filed with the Commission will be entitled to the exemption. The limitations on the equivalent of one MDS channel per party and per area include any cable/ITFS operations grandfathered pursuant to paragraph (k) of this Section or any cable/MDS operations grandfathered pursuant to Section 21.912(f) of this Chapter. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel(s), whichever is later.

(k) Lease arrangements between cable and ITFS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will not be subject to the prohibitions of paragraph (h) of this Section. Leases between cable television entities and ITFS entities executed on February 8, 1990, or thereafter, are invalid.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Request by TV 14, Inc. MMB File No. 901214A
for Declaratory Ruling/Waiver of
Section 73.658(m) of the Commission's
Rules with Respect to Inclusion of
Station WTLK(TV), Rome, Georgia in the
Atlanta, Georgia Television Market

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1991; Released: December 10, 1991

By the Commission:

1. TV 14, Inc., licensee of WTLK(TV), (independent), channel 14, Rome, Georgia has requested a ruling that WTLK(TV) is a station in the Atlanta, Georgia television market for purposes of Section 73.658(m) of our rules.

2. Public notice of this request was given by the Commission on October 6, 1991 and responsive pleadings were filed by four parties, all of whom are Atlanta, Georgia television station licensees: Channel 36 Licensee Corp, licensee of WATL(TV), channel 36; Georgia Television Company, licensee of WSBTV, channel 2; Pacific and Southern Company, Inc., licensee of WXIA-TV, channel 11; and WGNX Inc., licensee of station WGNX(TV), channel 46.

BACKGROUND

3. Section 73.658(m) of the Commission's rules generally permits a television station to buy exclusive rights in nonnetwork programming only against other television stations in the same market and against stations no more than 35 miles distant. The rule has as its intended purpose facilitating the acquisition of programming by stations in "overshadowed" markets[1] The rule states, in relevant part:

> No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away ... from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in Section 76.51 of this chapter ....

REQUEST AND ARGUMENT

4. Petitioner asks that the Commission act, as it did in *Press Television Corp., supra,*[2] through waiver or declaratory ruling, and hold that station WTLK is a station in the Atlanta, Georgia television market and that stations in Atlanta are entitled to acquire programming exclusivity against it and vice versa. In support of this request, it advances essentially seven points:

> -- That its station, based on the objective facts of the market, is already part of and competitive with Atlanta stations; that it places a city grade contour signal over Atlanta and a grade B contour over the vast majority of the 60 counties in the Atlanta television market area; and that it faces grade B coverage and cable television carriage of the Atlanta stations in Rome.
>
> -- That it is already generally recognized to be a station in the market as reflected by the fact that the news media include WTLK in their Atlanta-station program listing and the rating services, on whom advertisers depend, include Rome in the Atlanta market designation (with a parenthetical reference).
>
> -- That grant of its request is consistent with the objective of the rule in question, which was intended to assist the survival and growth of "overshadowed" stations.
>
> -- That because it is a new station, in financial distress, proposing a unique 24-hour per day all-talk format with locally produced public affairs programming at the heart of its programming efforts, it is entitled to special consideration from the Commission and to have its request acted on without the necessity of awaiting a more lengthy review of issues about other markets in the rulemaking process.
>
> -- That grant of the request will actually be of potential benefit to the stations in Atlanta by permitting them to negotiate for program exclusivity against a station which is competitive in their market area.
>
> -- That the situation presented is sufficiently similar to that in *Press Television Corp., supra,* that comparable action is compelled.
>
> -- And, finally, that the Commission need have no concern with an avalanche of similar requests if its action is limited to situations where the station intended to be protected by the rules is seeking to have that protection waived.

5. None of the parties responding to this request dispute the contention that WTLK(TV) is a competitive station in the Atlanta market as a matter of fact. WGNX Inc., for

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[1] *See Press Television Corp.*, 4 FCC Rcd 8799, 8800-01 (1989), *aff'd on recon.*, 6 FCC Rcd 6563 (1991); *Ralph C. Wilson Industries, Inc.*, 91 FCC 2d 127, 137-8 (1982).

[2] In that case, the Commission included a station in Clermont, Florida as a local station in the Orlando-Daytona Beach-Melbourne-Cocoa market for purposes of Section 73.658(m) after concluding that the station in Clermont was unavoidably competitive with other stations in that market.

example, notes that WTLK directs its programming, through the location of its transmission facilities, to viewers in metropolitan Atlanta and that the stations in Rome and Atlanta should be entitled to purchase program exclusivity against each other. All of the responding parties argue, however, that the matters raised should be addressed through the *Further Notice of Proposed Rulemaking in Docket 87-24,* 3 FCC Rcd 6171 (1988) (reviewing the scope of exclusivity under the territorial and cable television exclusivity rules and reviewing the market designations used for proposes of these rules). They deny that this is the kind of unambiguous case presented in *Press Television Corp.* In this regard, the Commission's attention is drawn to the fact that Clermont, the city of license in the *Press* case, was within 35 miles of Orlando, one of the named communities in that market, whereas Rome is some 56 miles from Atlanta and WTLK's station facilities are not colocated with those of any Atlanta station. Rather than presenting the same facts and equities as the *Press* case, it is argued, the situation is indistinguishable from the situations of innumerable stations in "overshadowed" markets. It is urged that the undocumented claims of financial distress do not warrant grant of the relief requested.

6. Finally, Georgia Television notes that, if the relief requested is granted, WSB-TV would be prevented from enforcing exclusivity against WTLK for programs already under contract. Both WSB-TV and WTLK(TV), it notes, already have the rights to broadcast "Donahue." If the request is granted, it asks that the Commission permit renegotiation of existing program contracts.

DISCUSSION

7. In *Press Television Corp., supra,* we stated that requests for relief from the territorial exclusivity rule are "ordinarily best addressed through a Rule Making process" and reiterated that we did not intend to follow "the concept of determining the applicability of the ... rule on a case-by-case basis." 4 FCC Rcd at 8801. Nevertheless, we noted that it would be anomalous to apply a rule intended to assist a station to compete and serve the public in a way that actually hindered that ability. Thus, following the thrust of the court's decision in *WAIT Radio v. FCC,* 418 F.2d 1153 (D.C. Cir. 1969), we indicated that we would not decline to act during the pendency of the outstanding Docket 87-24 rulemaking "[w]here there is a factual pattern as unambiguous as that here and the rule appears to be functioning in conflict with its intended purpose." *Id.*

8. We believe that the situation presented by WTLK(TV) here fits the pattern described in *Press* and that similar action in warranted. In *Press,* we found that the station at issue was "unavoidably competitive" with other stations in the market against whom it wanted to acquire exclusivity. We further found that the station, an independent UHF facility licensed to a community on the fringe of the market, was the very type of station the Commission intended to protect when adopting the territorial exclusivity rule in the first instance. Under these circumstances, we concluded that the public interest would best be served by waiving the restrictions of Section 73.658(m) to enable the station to assert nonnetwork program exclusivity against its actual competitors.

9. Similarly, in this case, there is no dispute presented as to the factual situation that exists in the market. WTLK and the stations in Atlanta have coverage areas that substantially overlap and the stations in fact compete for audience throughout most of the Atlanta market area. Although the transmitters of the Atlanta and Rome stations are not on the same tower, as were those of the Clermont and Daytona Beach stations in *Press,* the competitiveness of the stations is clearly evidenced by the extent of their overlapping service areas. Moreover, as we noted in *Press,* Section 73.658(m) of the rules was adopted to assure that excessive contractual exclusivity was not unreasonably depriving some stations, particularly independent UHF stations and the public served by them, of valuable programming. The rule clearly reflects the Commission's intention to permit stations servicing the same market area with competing facilities to acquire exclusivity against each other. At the same time, the rule was intended to assist new UHF independent stations operating in "fringe" areas to acquire programming. *First Report and Order in Docket 18179,* 42 FCC 2d 175 (1973), *reconsideration granted in part,* 46 FCC 2d 892 (1974). "The stations which the rule was intended to protect, " as the Commission has stated," are overshadowed stations, with a limited overlap and a limited capacity to compete with the larger station." *Ralph C. Wilson Industries , Inc.,* 91 FCC 2d 127, 137-8 (1982). Since the station seeking the waiver in this case is the very type of facility that was meant to benefit from our territorial exclusivity restrictions, it would be entirely inconsistent with the intent and thrust of the rule, as it would have been in *Press,* to deny the relief requested by WTLK(TV).

10. While we continue to believe that less clear-cut cases should be resolved through a more general rulemaking process, we clearly have the authority to address situations such as this through the waiver process: "The agency's discretion to proceed in difficult areas through general rules is intimately tied to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC,* 418 F.2d at 1157. It would be counterproductive to put this station at risk by awaiting the completion of the pending rulemaking and our actions here and in *Press* -- both of which deal with unique and limited sets of facts -- in no way prejudge the resolution of the much broader issues raised in that proceeding. Finally, we see no reason why special treatment is necessary to account for existing contractual arrangements. Nothing in the rules or in this ruling would preclude the renegotiation of existing contracts.

11. Accordingly, IT IS ORDERED, That the request filed December 14, 1990 by TV 14, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Advanced Technology Cellular Telecommunications	CC Docket No. 91-324
Cherokee Communications, Inc.	CC Docket No. 91-325
Capital Network Systems, Inc.	CC Docket No. 91-326
Com Systems, Inc.	CC Docket No. 91-329
Conquest Telecommunications Services	CC Docket No. 91-327
CPS Operator Services, Inc.	CC Docket No. 91-328
International Pacific, Inc.	CC Docket No. 91-330
Peoples Telephone Company, Inc.	CC Docket No. 91-331
South Texas Phone, Inc.	CC Docket No. 91-332
TelTrust, Inc.	CC Docket No. 91-333
U.S. Fiberline Communications	CC Docket No. 91-334
U.S. Long Distance, Inc.	CC Docket No. 91-335

ORDER

Adopted: November 15, 1991; Released: November 15, 1991

By the Chief, Common Carrier Bureau:

1. On November 8, 1991, we released orders in the captioned dockets directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2). The announcement requirement becomes effective on November 18, 1991, ten days after release of the *Rate Review Orders*.

2. Several of the OSPs that are subject to the *Rate Review Orders* seek stays of the announcement requirement imposed by those Orders. They generally argue that the announcement requirement is unfair or unlawful. In addition, some OSPs have asserted that they are unable to comply with the announcement requirement by the November 18 deadline for technical reasons. They cite, for example, their use of store-and-forward technology to provide operator service and state that they must therefore reprogram each telephone in order to make the required announcement.

3. We find that an extension of the announcement requirement deadline is warranted. As we have noted, some of the OSPs subject to the *Rate Review Orders* have indicated that they are unable to make the necessary technological changes to their facilities by November 18. We therefore extend the effective date of the announcement requirement until December 18, 1991, in order to allow OSPs sufficient time to come into compliance with this requirement. We will address petitioners' requests for a stay on the merits at a later date.

4. IT IS THEREFORE ORDERED, that the effective date of the requirement that Advanced Technology Cellular Telecommunications, Cherokee Communications, Inc., Capital Network Systems, Inc., Com Systems, Inc., Conquest Telecommunications Services, CPS Operator Services, Inc., International Pacific, Inc., Peoples Telephone Company, Inc., South Texas Phone, Inc., TelTrust, Inc., U.S. Fiberline Communications, and U.S. Long Distance, Inc., announce, at the beginning of each call that they handle that their rates are available upon request IS EXTENDED until December 18, 1991.

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[1] Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, DA 91-1379, released Nov. 8, 1991 (Com.Car.Bur.); Cherokee Communications, Inc., CC Docket No. 91-325, DA 91-1380, released Nov. 8, 1991 (Com.Car.Bur.); Capital Network Systems, Inc., CC Docket No. 91-326, DA 91-1381, released Nov. 8, 1991 (Com.Car.Bur.); Com Systems, Inc. CC Docket No. 91-329, DA 91-1384, released Nov. 8, 1991 (Com.Car.Bur.); Conquest Telecommunications Services, CC Docket No. 91-327, DA 91-1382, released Nov. 8, 1991 (Com.Car.Bur.); CPS Operator Services, Inc., CC Docket No. 91-328, DA 91-1383, released Nov. 8, 1991 (Com.Car.Bur.); International Pacific, Inc., CC Docket No. 91-330, DA 91-1385, released Nov. 8, 1991 (Com.Car.Bur.); Peoples Telephone Company, Inc., CC Docket No. 91-331, DA 91-1386, released Nov. 8, 1991 (Com.Car.Bur.); South Texas Phone, Inc., CC Docket No. 91-332, DA 91-1387, released Nov. 8, 1991 (Com.Car.Bur.); TelTrust, Inc., CC Docket No. 91-333, DA 91-1388, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Fiberline Communications, CC Docket No. 91-334, DA 91-1389, released Nov. 8, 1991 (Com.Car.Bur.); U.S. Long Distance, Inc., CC Docket No. 91-331, DA 91-1390, released Nov. 8, 1991 (Com.Car.Bur.). (*Rate Review Orders).*

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22,
74 and 94 of the Commission's
Rules to Establish Service and
Technical Rules for Government
and non-Government Fixed
Service Usage of the Frequency
Bands 932-935 and 941-944 MHz

ORDER

Adopted: November 26, 1991; Released: November 27, 1991

By the Office of the Managing Director, Common Carrier Bureau, and Private Radio Bureau:

1. This *Order* amends our rules pertaining to the fee type codes and addresses, 47 C.F.R. Sections 1.1102 and 1.1105, solely for private radio and common carrier license applications in the Government/non-Government fixed service for the point-tomultipoint frequencies at 932-932.5/941-941.5 MHz (932/941 MHz). The *Order* also modifies our rules pertaining to the initial filing period for these frequencies, 47 C.F.R. Sections 22.27(b)(2) and 94.25(k). The amendments are necessary to facilitate Commission processing of the 932/941 MHz applications.

2. The fee type code for private radio applications is PEP. The fee is $155 per application. Each private radio application *requiring a fee* must have the following inscription on the face of its envelope and be sent to:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
Private Radio Bureau
P.O. Box 358675
Pittsburgh, PA 15250-5675

Each private radio application *not requiring a fee* must have the following inscription on the face of its envelope and be sent to:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
1270 Fairfield Road
Gettysburg, PA 17325-7245

3. The fee type code for common carrier applications is CMP. The fee is $230 per transmitter. Each common carrier application *requiring a fee* must have the following inscription on the face of its envelope and be sent to:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
Common Carrier Bureau
P.O. Box 358924
Pittsburgh, PA 15251-5924

Each common carrier application *not requiring a fee* must be filed with or sent to:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
Office of the Secretary
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

4. We are also modifying the initial filing period for the applications for 932/941 MHz frequencies from one week for all applications to two days for five different groups of applications. This change is necessary because of the large initial volume of applications anticipated for these frequencies. Permitting only one week for the submission of all initial 932/941 MHz applications would result in an excessive burden on Commission processing facilities. Accordingly, we are dividing the United States and its outlying areas into five groups and will accept applications from each group during separate two-day filing periods. While the two-day filing period for each group is shorter than previously specified, we note that such a filing period has been recently used successfully with respect to the submission of 220-222 MHz license applications (PR Docket No. 89-552).

5. This action is taken pursuant to authority found in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), and pursuant to Sections 0.231(d), 0.291, and 0.331 of the Commission's Rules, 47 C.F.R. Sections 0.231(d), 0.291, and 0.331. These rule changes pertain to agency management and procedure, and therefore public comment is not required by the Administrative Procedure Act, *see* 5 U.S.C. Section 553(a)(2), (b)(A). This *Order* is effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

Richard M. Firestone
Chief, Common Carrier Bureau

Ralph A. Haller
Chief, Private Radio Bureau

RULE CHANGES

I. Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1–PRACTICE AND PROCEDURE

1. The authority citation in Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.1102 is amended as follows:

Section 1.1102 Schedule of charges for private radio service.

Action	FCC form No.	Fee amount	Fee type code	Address
* * * *				
3. Operational Fixed Microwave Stations:				
* * * *				
e. 932-932.5/941-941.5 MHz Point-to-Multipoint Channels	FCC 402	155	PEP	Federal Communications Commission 932/941 MHz Point-to-Multipoint Channels Private Radio Bureau P.O. Box 358675 Pittsburgh, PA 15250-5675
* * * *				

3. Section 1.1105 is amended as follows:

Section 1.1105 Schedule of charges for common carrier services.

Action	FCC form No.	Fee amount	Fee type code	Address
* * * *				
2. Domestic Public Land Mobile Stations (includes Base, Dispatch, Control and Repeater Stations):				
* * * *				
s. 932-932.5/941-941.5 MHz Point-to-Multipoint Channels (per transmitter)	FCC 401 & FCC 155	230.00	CMP	Federal Communications Commission 932/941 MHz Point-to-Multipoint Channels Common Carrier Bureau P.O. Box 358924 Pittsburgh, PA 15251-5924
* * * *				

II. Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22--PUBLIC MOBILE SERVICE

1. The authority citation in Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.27 is amended by revising paragraph (b)(2) to read as follows:

Section 22.27 Public notice period.

* * * *

(b)(2) Applications for frequencies in the 932-932.5/941-941.5 MHz bands shall be filed initially during one of five two-day periods to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis.

* * * *

III. Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94--PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.25 is amended by revising paragraph (k) to read as follows:

Section 94.25 Filing of applications.

* * * *

(k) Applications for frequencies in the 932-932.5/941-941.5 MHz bands shall be filed initially during one of five two-day periods to be announced by public notice. After the initial filing period for both these frequencies and the frequencies at 932.5-935/941.5-944 MHz, applications for the 932-935/941-944 MHz bands will not be accepted until further public notice is given by the Commission. During the initial filing period, applications for frequencies in the 932-932.5/941-941.5 MHz bands need not specify the frequencies requested, but thereafter must do so. Applications for frequencies in the 932.5-935/941.5-944 MHz bands must specify the frequencies requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 454

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1991; Released: November 26, 1991

By the Chief, Common Carrier Bureau:

1. On July 30, 1991, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 454, to provide a form of 800 database service. On June 4, 1991, Bell Atlantic requested a waiver of Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111, 69.112, to establish a subelement in the Transport element of Switched Access for this service. Bell Atlantic's waiver request is pending. For the reasons discussed below, Transmittal 454 is patently unlawful on its face, and must be rejected.

2. Four parties filed petitions to reject or suspend and investigate Transmittal 454. These parties are: Ad Hoc Telecommunications Users Committee (Ad Hoc); Aeronautical Radio, Inc. (ARINC); Allnet Communications Service, Inc. (Allnet); and National Data Corporation (NDC). The petitioners argue, *inter alia*, that Transmittal 454 cannot go into effect unless Bell Atlantic obtains the waiver it requested. ARINC Petition at 4-6; Ad Hoc Petition at 10-12; NDC Petition at 4-5. We agree with the petitioners' arguments in this regard. In the absence of a waiver, Transmittal 454 is not in compliance with Sections 69.111 and 69.112, which specifies the tariff structure for Transport services.[1] Inasmuch as this transmittal violates an applicable Commission Rule that has not been waived, the transmittal is patently unlawful. Therefore, we reject Transmittal 454.[2]

3. ACCORDINGLY, the petitions to reject or suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal 454, filed by Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., Allnet Communications Service, Inc., and National Data Corporation, ARE GRANTED, to the extent indicated herein and otherwise ARE DISMISSED without prejudice.

4. IT IS FURTHER ORDERED that Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 454, IS REJECTED.

5. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL REMOVE the unlawful portions of the tariff within five days of the release date of this Order. We hereby waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and grant Special Permission No. 91-1044, for this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] In CC Docket No. 86-10, the Commission is considering whether and how to amend Part 69 to establish a rate structure for database 800 services. That rulemaking proceeding is continuing and has not yet been completed.

[2] Because of our decision regarding the need for a waiver of the Commission's Rules, we need not discuss the petitioners' remaining arguments.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 27, 1991

REVISED FILING WINDOW FOR POINT-TO-MULTIPOINT CHANNELS IN THE 900 MHZ GOVERNMENT/ NON-GOVERNMENT FIXED SERVICE

General Docket No. 82-243

This *Public Notice* announces a revised filing window and summarizes the application filing process for non-Government point-to-multipoint channels in the 900 MHz Government/non-Government fixed service.[1] Applications for these channels must be filed during the appropriate two-day period designated for each area as specified below. All applications will be treated as being filed at the same time. The proper filing window is based on the state (or other area) where the master/control station's transmitter site is located, regardless of the applicant's mailing address, the location of the applicant's office, or any other factor.

Geographic Division of the U.S. for Filing Purposes

January 7 and 8, 1992

Connecticut
Delaware
District of Columbia
Maine
Maryland
Massachusetts
New Hampshire
New Jersey
New York
Pennsylvania
Rhode Island
Vermont
Virginia
West Virginia

January 14 and 15, 1992

Alabama
Arkansas
Florida
Georgia
Louisiana
Mississippi
North Carolina
South Carolina
Tennessee

January 21 and 22, 1992

Illinois
Indiana
Iowa
Kentucky
Michigan
Minnesota
Missouri
Ohio
Wisconsin

January 28 and 29, 1992

Colorado
Kansas
Montana
Nebraska
New Mexico
North Dakota
Oklahoma
South Dakota
Texas
Utah
Wyoming

February 4 and 5, 1992[2]

Alaska
Arizona
California
Hawaii
Idaho
Nevada
Oregon
Puerto Rico and
other outlying U. S. areas
Washington

A list of the 932/941 MHz point-to-multipoint channels is appended to this public notice. The specific filing requirements will vary depending upon the nature of the facilities requested, as described below. Applications received at the official filing locations before or after the appropriate two-day period as designated above will be dismissed as untimely filed.

Applications Requiring a Fee

Common Carrier Bureau applications must be filed on FCC Form 401 and must comply with all pertinent standards of Part 22 of the Commission's Rules. Each individual application must be accompanied by FCC Form 155 with Fee Type Code CMP designated in the appropriate column and a single check made payable to the Federal Communications Commission in the amount of $230 times the fee multiple (number of transmitters). Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
Common Carrier Bureau
P.O. Box 358924
Pittsburgh, PA 15251-5924

Private Radio Bureau applications must be filed on FCC Form 402 and must comply with all pertinent standards of Parts 1 and 94 of the Commission's Rules.[3] FCC

[1] *See Third Report and Order/Memorandum Opinion and Order*, GEN Docket No. 82-243, 6 FCC Rcd 4320 (1991). The specific frequencies that are available for point-to-multipoint use are located at 932-932.5 MHz and 941-941.5 MHz. For convenience, we refer to these frequencies as the 932/941 MHz point-to-multipoint channels.

[2] Federal Government applications will also be filed during this period.

[3] These applications will automatically have fee type code PEP entered by Mellon Bank for subsequent update of the Commission's automated database.

Form 155 is not required for these private radio applications. Each individual application must be accompanied by a separate check made payable to the Federal Communications Commission in the amount of $155. Each individual application must be in a sealed, manila envelope with the following inscription on its face:

Federal Communications Commission

932/941 MHz Point-to-Multipoint Channels

Private Radio Bureau

P.O. Box 358675

Pittsburgh, PA 15250-5675

Applications may be delivered to the Mellon Bank in one of two ways, either walked in or mailed in.

Walk-Ins

Applications may be delivered to One Mellon Bank Center, 500 Grant Street, Pittsburgh, PA 15258, *anytime* between 12:01 a.m. on Tuesday and 11:59 p.m. on Wednesday during the appropriate filing period. The street entrance to the Window Filing location is on the Grant Street side of the building (across from Oliver Flowers). Signs will be posted in both One Mellon Bank Center and Three Mellon Bank Center indicating the Filing Window location.

The "deliverer" should proceed directly to the street entrance described above and identify himself (herself) as having applications for the 932/941 MHz point-to-multipoint channels filing window.

CAUTION: One Mellon Bank Center is not the customary address for filing applications requiring a fee. This location has been established to accommodate this filing window. *Do not deliver these applications to any other location!* These applications will not be accepted at any other facility.

Consistent with Commission procedure, Mellon Bank will provide a single receipt by date stamping any single sheet of paper.

Directions to One Mellon Bank Center:

From the Greater Pittsburgh International Airport and Interstate 79:

(Proceed east on Parkway (Interstate 279) towards downtown Pittsburgh. Go through the Fort Pitt Tunnels and across the Fort Pitt bridge. Follow signs to Parkway East (Monroeville). Travel approximately 1/4 of a mile to the Grant Street exit (Exit 3). Proceed Grant Street to One Mellon Bank Center. The street address is 500 Grant Street. Enter building at designated area and follow signs.

From Pennsylvania Turnpike:

Take exit 6 (Monroeville) to parkway (Interstate 376). Go west on parkway to the Grant Street exit (Exit 3). Proceed on Grant Street to One Mellon Bank Center. Enter the building at designated area and follow signs.

Parking is available in several parking garages which are within two blocks of One Mellon Bank Center. Chatham Garage is located on Fifth Avenue; and Mellon Square Garage is on Sixth Avenue (across from the Alcoa Building). There is also a loading area located behind One Mellon Bank Center on Ross Street.

Mail-Ins

Filings may be mailed to one of the two lockboxes listed below. Applications must be *received* on either Tuesday or Wednesday of the appropriate filing window.

For Common Carrier Bureau applications, mail to:

Federal Communications Commission

932/941 MHz Point-to-Multipoint Channels

Common Carrier Bureau

P.O. Box 358924

Pittsburgh, PA 15251-5924

For Private Radio Bureau applications, mail to:

Federal Communications Commission

932/941 MHz Point-to-Multipoint Channels

Private Radio Bureau

P.O. Box 358675

Pittsburgh, PA 15250-5675

Questions

Any questions regarding filing fees should be directed to the Fees Hotline at (202) 632-FEES.

Special Note to Private Radio Applicants

We also take this opportunity to correct certain misconceptions that we understand are pervasive regarding the potential use and value of multiple address system (MAS) channels for private radio services.[4] Potential applicants for these channels are urged to be cautious of claims made by application preparers that MAS licensees could realize windfall profits. Private radio MAS channels are *not* suitable for providing a communications service to a large sector of the general public, such as channels the Commission has allocated for cellular, paging, or specialized mobile radio (SMR) services. Instead, potential users of MAS channels are limited to various types of businesses with specialized communications needs, generally internal to those businesses. For example, utilities employ MAS channels for load management and banks use MAS channels to facilitate electronic funds transfers.

Moreover, it is important to note that many MAS channels, in addition to those that are the subject of this public notice, are currently available for private radio use and can be applied for throughout the country in all but six markets. Completion of an application for an MAS license does not require special skills or qualifications other than a knowledge of the operational and technical specifics of the proposed system and its expected use. An applicant that is awarded a private radio MAS license must construct at the coordinates specified in the applica-

[4] MAS can be used interchangeably with point-to-multipoint.

tion, place that station in operation within 12 months of the date of license grant, and may not assign the license to another party until these conditions are satisfied. After the closing of each window, major amendments to applications and modifications of licenses for these MAS frequencies, including station location changes, will not be accepted until subsequent windows are opened. Likewise, requests for construction extensions that may be required to accommodate station location changes will be reviewed on a case-by-case basis and be subject to a sufficient justification showing. Finally, we emphasize that our decision to employ a lottery leading to the award of licenses for the MAS channels under consideration herein is based solely on reasons of administrative convenience to facilitate the overall licensing process.

Applications Not Requiring a Fee

Common Carrier Bureau applications *not requiring a fee* (*See* Section 1.1112 of the Commission's Rules) must be filed on FCC Form 401 and must comply with all pertinent standards of Part 22 of the Commission's Rules. Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
Office of the Secretary
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Applications that are mailed must be *received* at the above address during the appropriate two-day window. Applications that are hand-delivered must be brought to the above address during the appropriate two-day period anytime between 8:00 a.m. and 5:30 p.m. Consistent with Commission procedure, the Secretary's Office will provide a single receipt by date stamping any single sheet of paper proffered.

Private Radio Bureau applications *not requiring a fee* (*See* Section 1.1112 of the Commission's Rules) must be filed on FCC Form 402 and must comply with all pertinent standards of Parts 1 and 94 of the Commission's Rules. Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope:

Federal Communications Commission
932/941 MHz Point-to-Multipoint Channels
1270 Fairfield Road
Gettysburg, PA 17325-7245

Applications that are mailed must be *received* at the above address during the appropriate two-day window. Applications that are hand-delivered must be brought to the above address during the appropriate two-day period anytime between 8:00 a.m. and 4:30 p.m. Consistent with Commission procedure, the Bureau will provide a single receipt by date stamping any single sheet of paper proffered.

All Applicants

REMEMBER: Each individual complete application must be in an individual envelope marked as indicated above. If more than one application is being submitted, all applications, properly packaged, may be delivered in one larger, properly addressed container. However, each individual complete application requiring a check must be so accompanied, *i.e.*, two or more applications may not be paid for with a single check.

During the initial filing period applicants may specify a channel preference, but the Commission will treat all channels in these bands as fungible and, together with the National Telecommunications and Information Agency (NTIA), will assign all channels. Applicants for channels in these bands may apply for either a single channel or a paired channel. Requests for a single channel in these bands will be considered to be for a lower power 932 MHz channel unless an area of operation is provided that shows that there are remote stations more than 48 kilometers from the master/control station. A single channel applicant that does not plan to communicate with remotes farther than this distance but that requires a higher power 941 MHz channel must submit a showing with its application to support its request.

Applications that are found acceptable for filing will be assigned a number. A random drawing of the assigned numbers will be conducted in order to rank these applications. To the extent that there are channels available, each applicant will be assigned its channel preference. When this is not possible, or if no channel preference is listed, then the lowest available channel will be assigned. If it is not possible to assign a channel because of prior assignments to higher ranked applicants, then the application will be set aside to be dismissed. This procedure will continue until all applications have either been assigned a channel or set aside to be dismissed.

Applications for these channels, including Government applications filed with the NTIA, will be listed in a Commission public notice as soon as feasible after the filing window closes. Petitions to deny filed against any of these applications must comply with requirements set forth at either Section 1.962(g) or Section 22.30 of the Commission's Rules, whichever is applicable.

The Commission will issue lists of applications that have been granted as quickly as administratively possible. After all applications have been processed, a further public notice will be issued opening a new filing window for any remaining channels.

The Back-up Filings procedure shall *not* apply to General Docket No. 82-243. *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, Fees II*, FCC 91-298, ¶¶17-23, Oct. 10, 1991.

(Appendix: Point-to-Multipoint Center Frequencies in MHz

Transmit (or Receive)	Receive (or Transmit)
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications of Century Chicago Broadcasting, Ltd. for Renewal of Licenses of Stations WPNT(AM)/WPNT-FM	File Nos. BR - 890801VY BRH - 890801YI

MEMORANDUM OPINION AND ORDER

Adopted: November 27, 1991; Released: December 11, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it (i) a "Petition to Deny" filed November 1, 1989, by the Illinois State Conference of Branches of the NAACP, various local branches of the NAACP and the National Black Media Coalition[1] against the renewal applications filed by Century Chicago Broadcasting, Ltd. for stations WPNT(AM)/WPNT-FM of Chicago, Illinois (WPNT)[2]; and (ii) the licensee's response to staff letters of inquiry. Petitioners allege that the challenged stations violated the Commission's EEO rules and policies. Accordingly, they request that we investigate the stations' employment practices and designate the renewal applications for hearing.

II. BACKGROUND

2. Pursuant to Section 309 (d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309 (d) (1). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. *Id.*; *see also Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

3. Initially we note that the licensee does not make any allegations contesting the standing of petitioners and that the petition was timely filed. Further, the petition was accompanied by declarations filed by both the state and local chapters of the NAACP sufficient to establish standing. *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Accordingly, we will treat the NAACP and its local branches as petitioners. [3]

4. Petitioners allege that during the license term 1983 - 1989, WPNT(AM)/WPNT-FM had "no more than token employment of Blacks and other minorities." They charge that the stations do not appear to be operating under meaningful EEO programs and have not proposed significant changes for the coming renewal term. Petitioners request that the Commission investigate the EEO policies of the challenged stations pursuant to *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 596 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). Further, petitioners argue that the renewal applications should be designated for an evidentiary hearing and denied.

5. The licensee maintains that petitioners have failed to present evidence of noncompliance with the Commission's Rules or policies sufficient to warrant inquiry. It therefore requests unconditional renewal of its licenses.

III. DISCUSSION

6. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee. 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

7. When the renewal application indicates a record of adequate EEO efforts, it is granted, if otherwise appropriate. If the application indicates a record of inadequate EEO efforts, the Commission may impose a variety of sanctions and remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, monetary forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we will designate the application for hearing if the facts so warrant. 47 U.S.C. Section 309 (e); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for recon. pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra*.

8. Review of this licensee's EEO record leads us to conclude that petitioners presented a *prima facie* case against the challenged stations, so that unconditional grant of the applications for renewal would be inconsistent with the public interest. *Astroline, supra*. The record evidenced an EEO program which reflected inadequate efforts.[4] Further inquiry was therefore necessary. *See Beaumont, supra; Bilingual, supra*.

9. Upon analysis of the licensee's opposition and response to our inquiry, we conclude that no substantial and material questions of fact remain. Therefore, designation for hearing is not warranted. *Astroline, supra*. We find no evidence that would indicate that the licensee discriminated. Our review, however, indicates a record of

inadequate efforts. We will therefore grant the renewal application subject to sanctions and prospective remedies as detailed herein.

10. Review of the licensee's renewal applications, opposition and inquiry response indicates that the licensee had 39 overall and 32 upper-level hiring opportunities from December 1, 1986, until December 1, 1989. The available information suggests that referrals were received for 17 of the 39 full-time positions.[5] With regard to sources contacted for the 39 positions, the licensee consulted resumes on file, industry referrals and/or employee referrals for 16 vacancies; a referral list[6] and employee referrals were used for recruitment of ten jobs; tapes on file were used to recruit for an additional seven openings; employee referrals were used for five further jobs; and "TV monitoring" was used to recruit for one position. It thus appears that the licensee did not actively recruit for 29 of 39 positions, having used its recruitment list, note 7, *supra*, to elicit minority and female applicants for only ten of the 39 overall vacancies. The licensee interviewed a total of 13 minorities (12 Blacks, one Hispanic) for 13 positions, including five minorities (four Blacks, one Hispanic) for ten upper-level positions. The licensee did not have documentation on the interviewees' race for 26 positions. The licensee hired four minorities (three Blacks, one Hispanic) between December 1986 and April 1988.[7]

11. The licensee reported that it assesses its affirmative action program on an ongoing basis by maintaining files summarizing the race, sex and referral source, when known, of each applicant. The licensee stated that it had not made a practice of gathering such data from all persons sending resumes to the station until early 1990. It began to track the number of interviewees in February 1988, and sporadically tracked the race and sex of interviewees begining in April 1988.

12. Petitioners characterize the minority staffing levels at WPNT during the license term as having "fluctuated wildly," alleging that minority employment never reached "market parity" with the Chicago minority labor force. According to petitioners, low minority employment coupled with the sophistication of the Chicago market as well as the extensiveness of the licensee's referral sources raise doubts about the licensee's recruitment efforts. Because WPNT did not actively hire minority employees and failed to garner minority referrals from its many sources, petitioners suggest that the licensee's contacts with its recruitment sources was infrequent and less than meaningful.

13. In opposition, the licensee claims that employment of minorities has remained close to 50% of parity over the seven-year license term -- despite staff cuts. As for any fluctuation in staff, the licensee responds that three minorities resigned in 1985 and that the resignations were not racially motivated. As to affirmative recruitment, the licensee reports that it maintained contact with 45 minority and women's organizations since 1984.

14. We find that the licensee's performance does not evidence discrimination, nor raise a substantial and material question of fact warranting further inquiry. In this regard, the licensee received minority referrals from general sources, as well as minority sources, for 17 of its 39 positions. Further, a total of 13 minorities were interviewed for 13 positions and four minorities were hired. In addition, we note that the licensee consistently employed minorities throughout the license term. However, the licensee's overall performance reflects inadequate EEO efforts. Our examination of the licensee's submissions reveals its EEO program was used for only 10 of its 39 vacancies. Also, the licensee did not begin to collect data for self-assessment until very late in the license term. Based on our examination of the inquiry response and the EEO program, it is evident that the licensee tracked the number of applicants for each opening only from February 1988 to December 1989. Additionally, the licensee did not record the race or ethnicity of its applicants until April 1988. The record before us substantiates that the licensee kept minimal applicant flow data, which made it difficult, if not impossible, to assess the effectiveness of its EEO program.

IV. CONCLUSION

15. We conclude that the station's EEO record does not raise substantial or material questions of fact sufficient to warrant a hearing. However, we do find WPNT's record similar to that of stations WODE/WNOK-FM in *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1706 (1990) (WODE/WNOK-FM), in which we imposed reporting conditions. Both stations were located in similarly sized available minority labor forces. The number of full-time positions filled was also similar, as was the number of minorities hired for upper-level positions. We found that both licensees endeavored to recruit women and minorities. We found no evidence of discrimination or the imposition of a ceiling on minority employment at the stations. However, the licensee in WODE/WNOK-FM and the licensee of WPNT did not keep track of the race of applicants until the end of the license term. Hence, neither licensee was able to engage in self-assessment of its EEO efforts. Accordingly, for the licensee's violation of Commission rules 73.2080 (b) (3), (b) (5), (c) (2), and (c) (5), 47 C.F.R. § 73.2080 (b) (3), (b) (5), (c) (2), and (c) (5), we find that submission of EEO progress reports is appropriate to ensure compliance.

16. Lastly, we note that the licensee suspended operations at WPNT(AM) due to financial distress on January 2, 1991. Century Chicago Broadcasting received Commission authority to remain silent until September 9, 1991. A subsequent silent authority request is pending.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, that the petition to deny filed by the NAACP and its affiliate branches IS DENIED.

18. IT IS FURTHER ORDERED that when action on the renewal application is ultimately taken,[8] the license renewal applications for WPNT(AM)/WPNT-FM will be made subject to reporting conditions.

19. IT IS FURTHER ORDERED, that the licensee of Stations WPNT(AM)/WPNT-FM[9] submit an original and one copy of the following information on August 1, 1992, August 1, 1993 and August 1, 1994:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national

origin and sex of the person hired. The list should also note which recruitment sources were contacted;[10]

(b) A list of employees as of the March 1, 1992 payroll period for the first report and as of the March 1, 1993 and March 1, 1994 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the stations' efforts to recruit minorities for each position filled during the 12 - month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

20. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media's EEO Branch.

21. Should you have any questions regarding this action or require further information concerning employment reports. you may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] By letter dated November 27, 1989, David Honig, counsel for NAACP, stated that it had not been his intention to make NBMC a party to the petition. He explained that NBMC was named solely because it was listed in a standard paragraph in his computer. Accordingly, we will treat the petition filed only by the NAACP and its branches as listed.

[2] On November 20, 1990, the stations changed their call signs from WXEZ(AM)/WXEZ-FM to WPNT(AM)/WPNT-FM.

[3] Declarations were submitted from David Livingston, President, Illinois State Conference, NAACP and Rev. Elmer Fowler, President and Syd Finley, Executive Secretary of the Chicago Southside Branch, NAACP. Mr. Finley represents under penalty of perjury that he is a listener to the petitioned stations. 47 U.S.C. Section 309 (d) (1); *See In re Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340 (1991). Thus, based on a timely filed petition and declarations from local and state NAACP officials, we find that the Chicago Southside Branch of the NAACP and the Illinois State Conference of Branches of the NAACP are petitioners. *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (conferring organizational party in interest standing to the South Carolina State Conference of Branches of the NAACP and various local NAACP branches); *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980).

[4] WPNT was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward both women and minorities.

[5] In its renewal application, the licensee reported that the recruitment sources contacted by the licensee that referred minorities for the eight full-time positions filled during the 12-month period prior to filing the renewal application were as follows: *Chicago Tribune* (12 minorities), *Chicago Sun-Times* (18 minorities), Chicago State University (one minority), Kennedy-King College (one minority), "Women Employed" (four minorities), Midwest Women's Center (three minorities), Latin Women In Action (two minorities), Chicago Urban League (three minorities). Existing employees provided two minority referrals. Walk-in and mail-in applications were received from 21 minority persons. It would appear that an additional five minority referrals were received for nine more positions that were filled outside the above referenced 12-month period. The licensee reported that as part of its EEO program it maintains a year-round academic internship program for area students. The stations reported that there have been 19 student interns since 1983: 14 females, six Blacks, and two Asians. The licensee also stated that it hired one intern as a full-time employee. The licensee did not report the race and gender of the intern, which position the intern was hired for, or whether it uses its internship program as a regular source of employee referrals.

[6] The referral list mentioned in the inquiry response included the following groups: Ada McKinley Community Services; Mexican-American Business and Professional Women; American Refugee Committee; Chinese American Civic Council; Affirmative Action Association; Native American Educational Services; Korean American Service Committee; Kenwood-Oakland Community Organization; Women's Conference; Mayor's Advisory Commission on Women; Chicago Labor Institute; Illinois Coalition of Women of Color; Pilsen Neighbors; Organization of New City; Alliance of Black Professionals; National Council of Negro Women; Park Ridge YMCA; Southwest Women Working Together; NAACP; Jane Addams Center Hull House; Chicago Commons; Women In Crisis Can Act; Operation Up-Lift; Unique Asian Resources; Operation Able; United Christian Community Service; Association House; American Association of University Women; Women's Program of Lakeview; National Association of Media Women; Minority Information Referral Center; National Association for Black Feminist[sic]; World Relief; Washington Business Institute; SER/Jobs for Progress; Training, Inc.; Women Employed; Midwest Women's Center; N.O.W.; Job Service; Employee Resource Centers; Flexible Careers; Job Resources; Spanish Coalition for Jobs; Mujeres Latinas En Accion; Parkway Community House; Mortensen Foundation; American Indian Business Association; Operation PUSH; American Women in Radio and TV; Jewish Vocational Service; MCNT; Japanese American Services; Chicago Urban League; Casa Central; STAT TAB; Society of Broadcast Engineers; YMCA Metro Chicago; Commonwealth of Puerto Rico-Immigration Division; Gads Hill Center; Spanish Coalition; Operation Search; Chicago Commission on Human Relations; Job Corps.

[7] The Chicago Metropolitan Statistical Area (MSA) is 43.3% female, 17.3% Black, and 7.6% Hispanic. In 1986, the licensee's Annual Employment Report indicated that of an overall staff of 48, four (8.3%) were Black, two (4%) were Hispanic, one (2%) was Asian/Pacific Islander. Of the 40 upper-level employees, two (5%) of the Blacks and the Asian/Pacific Islander (2.5%) occupied upper-level positions. In 1987, the station employed five (10.9%) Black employees and one (2%) Hispanic out of a total of 46 overall; four (10.8%) Blacks were employed on an upper-level staff of 37 employees. In 1988, the licensee reported a full-time staff of 34, with three (8.8%) Black employees and one (3%) Hispanic employee. The upper-level staff comprised 29 employees, including two (7%) Blacks. The 1989 Annual Employment Report included 30 total employees; two (6.7%)

Blacks and two (6.7%) Hispanics employed overall; one (4%) Black and one (4%) Hispanic out of a total of 25 employees were working in upper-level capacities.

[8] We note that WPNT(AM) is silent and applications are pending before the Commission on the assignment of license and modification of license as well as the renewal of license. The application for renewal will remain deferred and will be acted on by the staff in conjunction with the assignment and modification applications.

[9] We note that the Commission has received the assignment application for WPNT(AM), File No. BAL - 910329EB. Regardless of the assignment, the reporting conditions follow the licenses.

[10] Such a list might start:

1. News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local Newspaper, A.W.R.T., National Hispanic Media Coalition, and NAACP.

Selected - Hispanic male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-123

In the Matter of

Amendment of Section 73.202(b), RM-7032
Table of Allotments,
FM Broadcast Stations.
(De Ridder, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 3, 1991; Released: December 11, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of West Central Broadcasting Company, Inc. ("petitioner"), licensee of Station KROK(FM), Channel 221A, De Ridder, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1605 (1990), proposing the substitution of Channel 221C3 for Channel 221A at De Ridder, and modification of its license for Station KROK(FM) to specify operation on the higher powered channel. Petitioner filed comments supporting the allotment at De Ridder. No other comments were received.

2. As stated in the *Notice*, Channel 221C3 can be allotted to De Ridder in compliance with the Commission's minimum distance separation requirements. However, the Commission noted that Station KROK(FM)'s Channel 221C3 contour lies with the Grade B (47 dBu) contour of Station KFDM(TV), Channel 6, Beaumont, Texas. Therefore, petitioner was requested to furnish a detailed preclusion study showing the impact of allotting Channel 221C3 to De Ridder on the availability of noncommercial educational stations on Channels 218, 219 and 220. In response, petitioner has shown that the allotment of Channel 221C3 to De Ridder will not cause any significant impact on existing or future noncommercial educational service in the area.

3. We believe the public interest would be served by substituting Channel 221C3 for Channel 221A at De Ridder, Louisiana, since it could enable Station KROK(FM) to expand its coverage area. Channel 221C3 can be allotted to De Ridder with a site restriction of 14.6 kilometers (9.1 miles) southwest to accommodate petitioner's desired site.[1] Channel 221C3 is short-spaced to Channel 221A, Station KTFA(FM), Groves, Texas. However, Station KTFA(FM) was ordered to Channel 223C2 in MM Docket No 87-104. *See* 3 FCC Rcd 4611 (1988), *app. for rev. dismissed*, 4 FCC Rcd 2003 (1989). Therefore, final licensing of Station KROK(FM) at De Ridder may be delayed until Station KTFA(FM) is licensed on Channel 223C2. As proposed, we will also modify petitioner's license for Station KROK(FM) to specify operation on Channel 221C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
De Ridder, Louisiana	221C3, 269A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of West Central Broadcasting Company, Inc., for Station KROK(FM), De Ridder, Louisiana, IS MODIFIED to specify operation on Channel 221C3, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station KTFA(FM), Groves, Texas, as follows: Voice in the Wilderness BC, Inc., P.O. Box 820, Bridge City, Texas 77611.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 221C3 at De Ridder are North Latitude 80-46-30 and West Longitude 93-25-00. Because this allotment results from a petition for rule making filed prior to October 2, 1989, the licensee at De Ridder may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station KLIL(FM), Channel 221A, Moreauville, Louisiana.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-254

In the Matter of

Amendment of Section 73.202(b), RM-7463
Table of Allotments,
FM Broadcast Stations.
(Hayden, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 3, 1991; Released: December 11, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making,* 6 FCC Rcd 5176 (1991), issued in response to a petition filed by North Idaho Broadcasting Company ("petitioner") proposing the substitution of Channel 233C for Channel 233A at Hayden, Idaho, and the modification of its construction permit for Station KKCH(FM) (formerly KMWC) at Hayden to specify operation on the higher powered channel. Petitioner filed comments restating its interest in Channel 233C, if allotted. Wayne D. Pickerill ("Pickerill"), an Airport Planning and Development Engineer for the Idaho Transportation Department Bureau of Aeronautics, filed comments.[1]

2. We believe the public interest would be served by the substitution of Channel 233C for Channel 233A at Hayden, Idaho, since it could provide the community with a wide coverage area FM station. Channel 233C can be allotted to Hayden in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit for Station KKCH(FM).[2] As stated in the *Notice,* Hayden, Idaho, is short spaced to unoccupied Channel 233A at Moyie, British Columbia, Canada. Therefore, petitioner must use a directional antenna to protect unoccupied Channel 233A at Moyie. Concurrence of the Canadian government has been obtained, since Hayden is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KKCH at Hayden to specify operation on Channel 233C.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hayden, Idaho	233C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of North Idaho Broadcasting Company for Station KKCH(FM), Hayden, Idaho, IS MODIFIED, to specify operation on Channel 233C in lieu of Channel 233A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, North Idaho Broadcasting Company, permittee of Station KKCH(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to Wayne D. Pickerill, Airport Planning and Development Engineer, Idaho Transportation Department, Bureau of Aeronautics, 3483 Rickenbacker, Boise, Idaho 83705.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

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[1] While stating that he "has no comment directly concerning the Table of Allotments, " Pickerill states that the allotment of Channel 233C at Hayden "could seriously impact radio communications at the Coeur d'Alene Airport." He asks that the Bureau of Aeronautics and the Seattle Regional Office of the Federal Aviation Administration be kept apprised of any activity in this proceeding. We will serve Pickerill with a copy of the *Report and Order.*

[2] The coordinates for Channel 233C at Hayden are North Latitude 47-43-54 and West Longitude 116-43-48.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-41

In the Matter of

Amendment of Section 73.202(b),	RM-7227
Table of Allotments,	RM-7725
FM Broadcast Stations.	
(Lady's Island and Ridgeland,	
South Carolina)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 3, 1991; Released: December 11, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Mattox-Guest of South Carolina, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1286 (1991), proposing the substitution of Channel 285C3 for Channel 285A at Ridgeland, South Carolina, the reallotment of Channel 285C3 from Ridgeland to Lady's Island, South Carolina, and the modification of Station WSHG's license accordingly. Petitioner filed comments counterproposing the allotment of Channel 285C3 to Ridgeland instead of Lady's Island.[1] Petitioner states that it would apply for the channel, if allotted to Ridgeland. No other comments were received.

2. Petitioner states that Channel 285C3 can be allotted to Ridgeland in compliance with the Commission's minimum distance separation requirements if Station WHCG(FM), Metter, Georgia, is modified to specify operation on Channel 279A instead of its present Channel 285A, as proposed in MM Docket 89-418.[2] In light of this fact, it requests that the Lady's Island proposal be considered as an alternative allotment should the Metter substitution not be adopted.[3]

3. We believe the public interest would be served by substituting Channel 285C3 for Channel 285A at Ridgeland, South Carolina, since it could provide the community with a wide coverage area FM service and enable Station WSHG to expand its service area. Channel 285C3 can be allotted to Ridgeland in compliance with the Commission's minimum distance separation requirements at Station WSHG's presently licensed transmitter site.[4] As proposed, we will also modify petitioner's license for Station WSHG to specify operation on Channel 285C3.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ridgeland, South Carolina	285C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Mattox-Guest of South Carolina, Inc., for Station WSHG, Ridgeland, South Carolina, IS MODIFIED to specify operation on Channel 285C3, in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Mattox-Guest of South Carolina, Inc., licensee of Station WSHG(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

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[1] Public Notice of the counterproposal was given on May 15, 1991, Report No. 1845. In light of the fact that this proceeding is uncontested, we accepted this counterproposal even though dependent upon favorable action in another proceeding. *Cf. Kaukauna and Cleveland, Wisconsin*, MM Docket 89-486, adopted November 22, 1991.

[2] Station WHCG(FM)'s license was modified to specify operation on Channel 279A in lieu of Channel 285A pursuant to the *Report and Order* in MM Docket 89-418. *See* 6 FCC Rcd ____ (1991), 56 FR 51844, published October 16, 1991. A copy of this *Report and Order* will be sent to Radio Metter, licensee of Station WHCG(FM).

[3] In the *Notice*, we questioned whether the reallotment of Station WSHG to Lady's Island would deprive Ridgeland of its sole local aural broadcast transmission service because the only other station licensed to Ridgeland, Station WCOG(AM), was off-the-air. In addition, we requested further information to determine that Lady's Island is a community for allotment purposes. However, in light of our action herein, these issues need not be discussed.

[4] The coordinates for Channel 285C3 at Ridgeland are North Latitude 32-26-10 and West Longitude 80-55-23.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WHCG(FM), as follows: William Jimmy Page, Tr/as Radio Metter, P.O. Box 238, Metter, Georgia 30439.

8. IT IS FURTHER ORDERED, That the proposal of Mattox-Guest of South Carolina, Inc., to reallot Channel 285C3 from Ridgeland to Lady's Island, South Carolina (RM-7227), IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

ORDER

Adopted: November 21, 1991; Released: November 22, 1991

By the Chief, Common Carrier Bureau:

1. On August 1, 1991, the Commission adopted a Report and Order in this proceeding further streamlining the tariff regulation of certain of AT&T's business services. [1] In that order, the Commission found that further streamlining of AT&T's Tariff 12 services would be in the public interest. [2] The Commission, however, declined to adopt further streamlining for Tariff 12 services in light of the then-pending remand proceeding relating to the lawfulness of some Tariff 12 offerings. [3] Instead, the Commission delegated authority to the Chief of the Common Carrier Bureau to perform the "ministerial task" of "extending further streamlining to Tariff 12 offerings if and when the relevant Tariff 12 offerings were found to be lawful in the Tariff 12 Remand proceeding. [4]

2. On October 24, 1991, the Commission found that the relevant Tariff 12 offerings are lawful, and in particular, that these offerings do not violate Section 202(a) of the Communications Act of 1934. [5] Therefore, pursuant to the authority delegated to us in the Interexchange Order, we extend further streamlining to AT&T's Tariff 12 offerings and amend Part 61 of our rules accordingly. As outlined in the Interexchange Order, AT&T may file Tariff 12 options on fourteen days notice and without cost support.

3. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 1, 4, 201-205, 208, 218 and 220(a) of the Communications Act of 1934, as amended 47 U.S.C. Sections 151, 154, 201-205, 208, 218, and 220(a), and Sections 0.91(g) and 0.291 of the Commission's Rules, 47 C.F.R. §0.91 and 0.291, that Part 61 of the Commission's Rules, 47 C.F.R. Part 61, is AMENDED as set forth in Appendix A.

4. IT IS FURTHER ORDERED, that this Order is effective November 25, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX A

Title 47 of the Code of Federal Regulations, Part 61, is amended as follows:

Section 61.58 is amended by revising subsections (c)(6) and (c)(7) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(c)* * *

(6) Tariff filings involving services included in § 61.42(c), except for services included in §§ 61.42(c)(1), and (c)(10), must be made on at least 14 days notice.

(7) The required notice for services included in §§ 61.42(c)(1), and (c)(10), tariff filings involving services included in § 61.42(f), or tariff filings involving changes in tariff regulations, other than tariff regulations for services described in subsection (c)(6), shall be that required in connection with such filings by dominant carriers that are not subject to price cap regulation.

* * * * *

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[1] Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991)(Interexchange Order). Tariffs subject to further streamlining may be filed on fourteen days notice. They are presumed lawful for purposes of advance tariff review and may be filed without cost support. Price cap ceilings and pricing bands do not apply to these filings. *See Id.* at para. 74.

[2] AT&T's Tariff 12 consists of a series of options, each constituting a customized, integrated package of telecommunications services. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (1989).

[3] *See* MCI Telecommunications Corp. v. FCC, 917 F. 2d 30 (D.C. Cir. 1990). *See also* AT&T Communications, Revisions to Tariff FCC No. 12, Order 6 FCC Rcd 740 (1991).

[4] 6 FCC Rcd 5880, at n. 119.

[5] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order on Remand, CC Docket No. 87-568, FCC 91-333 (released November 22, 1991) (*Tariff 12 Remand Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-346

In the Matter of

Intelligent Networks

NOTICE OF INQUIRY

Adopted: November 21, 1991; Released: December 6, 1991

Comment Date: February 18, 1992
Reply Comment Date: March 23, 1992

By the Commission: Commissioner Dugan issuing a statement.

I. INTRODUCTION

1. The Commission is beginning this inquiry to open public debate on the interrelationship of Open Network Architecture (ONA) with emerging network design. More specifically, this inquiry is designed to gather information on future network capabilities, including the benefits and costs of modular network architectures, to explore ways in which more open access may be provided through the intelligent networks of the future, and to seek comment on the appropriate role of regulation in this process. This proceeding is intended to complement and reinforce the gains already made in the ONA process in making local exchange networks accessible to enhanced service providers. Our goal is to encourage development of future local exchange networks that are as open, responsive, and procompetitive as possible, consistent with our other public interest goals, such as ensuring network reliability and integrity and avoiding the imposition of uneconomic costs.

II. BACKGROUND

2. The Commission's approach to ONA has been an evolutionary one. The focus in the original review of the Bell Operating Company (BOC) ONA Plans was the initial set of key basic service elements (BSEs) -- those to be implemented within one year of approval of the ONA Plans. In the *BOC ONA Order*, the Commission rejected arguments that it should approve the ONA Plans only after the BOCs implemented a radical reconfiguration, or fundamental unbundling, of their networks. The Commission concluded that to require the BOCs to provide ONA based on a more disaggregated, and at that time unspecified, architecture would be extremely costly and unnecessary for implementation of ONA. Instead, the Commission required that the BOCs unbundle BSEs only to the extent technologically feasible given the current network. The BOCs have nearly accomplished this task, and have all filed federal tariffs for their initial sets of ONA services. However, as we have often stated, ONA is a long-term evolutionary process, and the Commission is committed to ensuring continuing progress in this area. We have established mechanisms for the continuing oversight of ONA, including annual reporting requirements, such as a rolling three-year deployment projection for future ONA services. [1] Moreover, the Commission has recognized that further unbundling may be in the public interest and has described fundamental unbundling as a long-term issue. [2]

3. With the implementation in the near term of the initial set of ONA services at federal and state levels, the Commission is now exploring ways in which more open access may be provided through the intelligent networks of the future, and examining the interrelationship of ONA principles and emerging network design. We plan to assess technological barriers to access that may be brought about by network architectures that may be unduly restrictive, to evaluate the effects of current regulation on this process, and to determine the appropriate future role for regulation. A petition filed by the Coalition of Open Network Architecture Parties (CONAP) described further below illustrates the concern of some that architectural barriers in the networks of the future could impede the development of greater competition in the provision of telecommunications services. To explore these and other related issues, we begin this inquiry.

III. DISCUSSION

A. The Current Network Architecture

4. At present, the local exchange carrier (LEC) networks consist principally of stored-program-controlled (SPC) central office switches from large switch manufacturers. [3] These switches are comprised of equipment and software. The equipment includes switching equipment that actually switches calls, and terminating equipment that terminates lines and trunks. The "generic" software includes the operating systems software and the call processing software that enables the switch to provide features and functions, such as routing, call forwarding, and call detail recording. Because the switch manufacturer develops the generic software on a proprietary basis, a LEC must return to the manufacturer of a switch and persuade it to develop a new generic if the LEC in the future wants

[1] *See generally* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, FCC 91-382, Report and Order, (adopted November 21, 1991) (*BOC ONA Further Amendment Order*). Annual reports will permit the Commission to monitor the BOCs' progress and to target areas for further amendments, if necessary.

[2] *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1, at 42-43, paras. 70-72 (1988) (*BOC ONA Order*), *reconsideration*, 5 FCC Rcd 3084, at 3085-3086, paras. 12-18 (1990) (*BOC Reconsideration Order*).

[3] The largest providers of switches in the United States are AT&T and Northern Telecom. To a lesser extent, Siemens, Ericsson, NEC, Alcatel, and others also provide switches to U.S. local exchange carriers.

that switch to perform a new feature or function. Depending on the complexity of the feature, the process can take several years and cost millions of dollars.

B. The Advanced Intelligent Network

5. The BOCs are currently evaluating a new network architecture, the Advanced Intelligent Network (AIN), through Bellcore for possible deployment in the 1990's.[4] The BOCs are hopeful that AIN will provide them with the freedom to create new features without changing the generic supplied by a switch manufacturer. This would allow the BOCs to avoid the necessity of finding a manufacturer to supply them with a new generic every time they wish to create a new service feature. Indeed, the BOCs contend that a major goal of AIN is to free them from the "tyranny" of the switch manufacturer.[5] Many BOCs argue that AIN will allow them to implement new ONA services requested by ESPs and other customers more quickly.

6. In current design, AIN uses a computer external to the switch to provide the features and functions necessary for new services. This remote computer, the service control point (SCP), houses databases with information on how to process certain calls that require special handling, such as 800 calls, and calls made with calling cards. An AIN-equipped switch recognizes certain types of calls (such as an 800 call) that require special processing (such as identifying the customer's interexchange carrier), and launches a query over the Common Channel Signaling network using Signaling System Number 7 (SS7) protocol to a remote database in the SCP. [6] AIN does not contemplate an entirely new architecture requiring replacement of the LECs' current switches, but rather combines existing switches with the SS7 signaling network and some additional network elements to give the BOCs a greater ability to control the functions available through the switch. In design, these new elements are to include Service Control Points, Adjuncts, and Intelligent Peripherals. [7]

7. At this stage of AIN development, there is still much uncertainty about its final form. It is possible that different versions of AIN may be deployed by BOCs at different times, based on different market conditions and BOC business plans.[8] For example, Ameritech and US West have already begun technical trials of their versions of AIN. [9] By contrast, Pactel has suggested that it might not deploy AIN, which it views as a transitional architecture, but instead wait to deploy an architecture that "separates logic and hardware" called "NETSYS." [10] While the BOCs may still be somewhat dependent under AIN on the switch manufacturer for feature-specific changes in the AIN switch to implement new features in remote databases, Pactel believes that NETSYS may provide switch software that does not need to be changed to implement new features.

C. CONAP Petition

8. CONAP has petitioned the Commission to conduct an investigation into the detail of BOC switching deployment plans in order to assure that the network of the future will be "modular and transparent." [11] CONAP asserts that the BOCs are currently contemplating major investments in existing switches and in an AIN network architecture that will not accelerate the deployment of a modular and transparent network, but will rather perpetuate the current "closed" network controlled by the BOCs. CONAP requests that the Commission require the BOCs to respond to specific questions about their switching system deployment plans, and encourage other interested parties to comment on the same questions. [12]

9. CONAP contends that a "modular and transparent" architecture built on standard interfaces would allow end users to have access to unbundled switch functionalities that they can use to write "service scripts" that would satisfy needs that they identify in the market. A modular network, according to CONAP, would maximize the opportunities for non-BOCs. CONAP explains that "local exchange carriers would continue to provide physical access to the network; end users and/or enhanced service providers, however, would provide the logical access to their services." CONAP does not ask for an architectural prescription, but asks only for investigation or inquiry into the BOCs' plans. [13]

10. In response to the petition, a number of parties filed

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[4] Bellcore, which is owned by the seven BOCs, carries out research and development activities pertaining to the provisioning of exchange access. The most advanced version of AIN, Release 1, is described in Bellcore technical advisories issued in May 1991. *See e.g.,* Bellcore: Advanced Intelligent Network (AIN) Release 1, Switching Systems Generic Requirements, Technical Advisory TA-NWT-001123 Issue 1, May 1991 ("Bellcore Technical Advisory").

[5] *See generally* In the Matter of Advanced Intelligent Network, discussed *infra,* Responses to CONAP Petition filed November 16, 1990: Ameritech Comments at 4; Bell Atlantic Comments at 1; BellSouth Comments at 8; NYNEX Comments at 10; Pactel Comments at 3; Southwestern Bell Comments at 2, 12-14; US West Comments at 2. *But see* AT&T Comments at 2 (AT&T's switch development activities are fully responsive to and subject to the demands of the local exchange carriers, who are AT&T's customers for such network equipment). *See also The Intelligent Network* (W. D. Ambrosch, A. Maher, B. Sasscer, Eds. 1989).

[6] *See generally* Bellcore Technical Advisory at Section 5, "AIN Event Detection and Processing"; *see also The Intelligent Network,* Chapter 1 at 13.

[7] *See generally* Bellcore Technical Advisory at 1-1 through 1-4. Examples of SCPs are the SCPs now being deployed by the LECs to house the databases used for Line Information Data Base (LIDB) validation of calling cards and for 800 database access. In the context of AIN, the database contains information on how to process specific types of calls. In the AIN Release 1 design, an Adjunct will also perform the same function as an SCP, but will communicate with the switch over a high speed interface, not over the SS7 network. An Intelligent Peripheral is designed to allow flexible information exchanges between an end user and the network to provide interactive services, such as announcement services.

[8] This assessment is based upon the BOCs' reports of their AIN deployment plans to the Commission in their April 1991 Amended ONA Plans. *See BOC ONA Further Amendment Order, supra* n. 1.

[9] *See* Ameritech Amended ONA Plan at 23; US West Amended ONA Plan at 40.

[10] Pactel Comments at 3 in response to CONAP Petition.

[11] *See* CONAP Petition at 6. CONAP's members include Aetna, American Airlines, Boeing Computer Services, Dun and Bradstreet, EDS, Ford Motor, General Electric, J. C. Penney, and Sears.

[12] *Id.* at 36-47.

[13] *Id.* at 6.

comments. [14] The BOCs generally argue that their network evolution plans are consistent with ONA policies set forth by the Commission in the *Computer III* proceedings, and that the issues in the CONAP petition were resolved in the *BOC ONA Order* and later upheld in the *BOC ONA Reconsideration*. [15] The BOCs also warn against possible harm to the network should CONAP's concept of a modular network be implemented. Parties supporting CONAP's petition generally claim that the BOCs' historic resistance to providing equal access to their competitors warrants an investigation into their future network deployment plans. [16]

D. Inquiry

11. In the *BOC ONA Order,* the Commission recognized that there could be long term benefits from the fundamental unbundling of the network.[17] Although the Commission declined at that time to require the BOCs to provide ONA by radically disaggregating their existing networks, the Commission nevertheless expressed interest in possible further unbundling. The Commission directed the BOCs to study, through the Information Industry Liaison Committee (IILC), the technical and operational issues associated with greater unbundling to assess their scope and possible solution.[18]

12. In addition to this effort, the Commission has taken action to ensure that the BOCs move beyond their initial ONA tariff filings and continue to offer new services on an unbundled basis. In the *BOC ONA Further Amendment Order,* we have established a comprehensive, ongoing reporting scheme that will enable the Commission to monitor the BOCs' progress. We have required the BOCs to file reports on: rolling updates of their plans to deploy ONA services, reevaluation of the feasibility of providing services previously considered technically infeasible, and responses to requests for new services. In addition, we require the BOCs to file additional information on their plans for deploying and unbundling SS7, Integrated Services Digital Network (ISDN), and Intelligent Network technologies. [19] We have also taken action to address unbundling issues outside of ONA proceedings. In the *Expanded Interconnection* proceeding, we are addressing an issue identified by some enhanced service providers as important to the long-term success of ONA -- unbundling LEC transmission facilities from LEC central offices. [20] With these actions, and with the initial implementation of ONA well under way, we now direct our attention to the longer-term future of ONA and consider ways to go beyond our near-term efforts to remove barriers in tariffs.

13. As a means of increasing access and of promoting innovative and efficient use of future networks, we initiate this inquiry to explore policy and regulatory issues raised by possible future local exchange network architectures. We believe it is an opportune time to examine such issues since the BOCs appear to be in the process of evaluating major network investments, such as AIN, that will affect the future design of their networks. Because of the importance of our goal of encouraging development of future local exchange networks that are as open as possible, consistent with our other public interest goals, such as maintaining network integrity and avoiding the imposition of uneconomic costs, we decide not to restrict the scope of the proceeding at this stage to the BOCs, but to consider future network development issues with respect to all Tier 1 local exchange carriers. [21]

14. As a matter of policy, this Commission believes it wiser to allow market forces, rather than regulatory fiat, to serve as the primary driver of developments of our national telecommunications assets. Market forces alone may not, however, provide the LECs with the proper incentives in developing their networks to explore all options of interest to network users, particularly those network users that are potential competitors.

15. In the past, the Commission has considered various suggestions for making the network more open. For example, in the *Computer III* proceeding, the Commission considered how different network architectures could affect the public interest. Specifically, in the *Phase I Order,* the Commission took notice of features that commenters said should be included in the concept of Open Network Architecture. Notable among such proposals was that of Ameritech, which described an architecture called Feature Node/Service Interface (FN/SI) that provided elemental basic service capabilities, known as "primitives," to

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[14] Other than the BOCs and the GTE domestic operating companies, six parties filed comments and five filed reply comments on the CONAP petition. A list of parties filing comments and reply comments is found in Appendix A. In response to a Public Notice that the Commission released on April 18, 1991 to establish an additional round of comments on the CONAP Petition, three parties filed further replies. These parties are also listed in Appendix A. Parties supporting CONAP's petition include the American Newspaper Publishers Association (ANPA), Association of American Railroads (AAR), Information Industry Association (IIA), MCI Telecommunications Corporation (MCI), North American Telecommunications Association (NATA), Prodigy Services Company (Prodigy), Teleport Communications Group (Teleport), California Public Utilities Commission (California), and MessagePhone, Incorporated (MessagePhone). NATA filed its comments and reply comments late. In the interest of a full record, its Motions for leave to file one day late are granted.

[15] *See e.g.,* Ameritech Comments at 6-8. BellSouth Comments at 11. *See BOC ONA Order,* 4 FCC Rcd at 41-43, paras. 69-72; *BOC Reconsideration Order,* 5 FCC Rcd at 3085-3086, paras. 12-18.

[16] *See e.g.,* ANPA Comments at 2, MCI Comments at 7-8; NATA Comments at 8-9; Prodigy Comments at 9; Teleport Comments at 1; California Reply at 1-3.

[17] *BOC ONA Order,* 4 FCC Rcd at 42, para. 70.

[18] *BOC ONA Order,* 4 FCC Rcd at 42, para. 70. The IILC has created a task group to investigate what has been formally designated as IILC Issue No. 026, "Long Term Unbundling and Network Evolution." The IILC is currently developing the procedures for creating a forum in which enhanced service providers and users can participate with the BOCs in developing the requirements for a network that is more disaggregated than the current network.

[19] *BOC ONA Further Amendment Order,* FCC 91-382 (adopted November 21, 1991).

[20] *See generally* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection).*

[21] Similarly, we ask commenters in this proceeding, to address access to local exchange networks for all network users and not just enhanced service providers. We do not consider these issues with respect to AT&T because, unlike the Tier 1 LECs, it does not control "bottleneck" local exchange networks.

enhanced service providers. [22] At the time of the *BOC ONA Order*, the Commission reviewed proposals for "modular" network architecture that promised greater "openness" than allowed by the existing network. [23] While acknowledging the potential value of such proposals, the Commission has never endorsed or approved any of them as the ultimate goal of ONA, but has instead focused on the relatively near-term implementation of the initial set of key ONA services." [24] Now that the initial stage of ONA is well under way, we can more fully consider the question of whether future networks that are more unbundled than the current networks are in the public interest. We seek comment on the effects of current regulation on the network design process and on the role that regulation should play in promoting the realization of ONA principles in future network design. We further seek comment on whether competition in the provision of interstate access is likely to increase rapidly, and how this increase in competition should affect our decisions here.

Modularity

16. Although various parties have argued that "modularity" is in the public interest, there does not appear to be consensus among them as to what modularity means in terms of specific network design or even the benefits it could confer. For example, CONAP describes modularity as a kind of "logical access" that would be provided to end users so that they could create service features without being required to work closely with the BOCs in developing the features. CONAP's vision of modularity, however, does not appear to encompass a physically disaggregated network. [25] Hatfield, on the other hand, describes a modular architecture as one that is based on natural modules, physically and logically interconnected at well specified interfaces, and designed to encourage the use of other vendors' equipment, devices, software, or services. [26] Similar to CONAP, Pactel states that its concept of an open and intelligent network, "NETSYS", would "separate logic and hardware." [27]

17. In order to make a realistic assessment of the costs and benefits of modularity in local exchange networks, we need to have a common understanding of what modularity would mean in that context. As a starting point in our evaluation, we believe it would be useful for parties to comment on: (1) the functions that a modular network could perform; (2) the nature of the various building blocks or modules that make up the system architecture; (3) the manner in which network users could access the system; (4) the approximate costs of developing the system modules; and (5) how network users could monitor and test the system in real time. [28] To the extent feasible, parties should also identify possible services that cannot now be obtained, or obtained efficiently, with current network architecture.

18. The benefits of modular architecture could be considerable, offering great flexibility to network users to develop new services, and increasing competition in the provision of both basic and enhanced services. However, we also believe that there may be significant costs to modularity. In addition to the economic costs associated with the replacement of current switches that a modular network would seem to require, we must address problems that may arise with increased access by network users to switches. It is vital to the public interest to protect the reliability and integrity of our telecommunications networks. For this reason, it will be important to evaluate whether future network technologies that promise wider network user access can provide sufficient network reliability, and at what costs. Therefore, we seek comment on whether the potential benefits of increased access by network users in a modular architecture outweigh any costs.

Intelligent Network

19. Some parties advocating a modular network express concern about what future networks will offer them, especially in light of their assessment of the BOCs' current design plans for AIN. CONAP claims that the implementation of AIN will not serve the public interest because it will be "closed" to network users, allowing only the BOCs to create new service functionalities from an SCP. CONAP explains that its members want to sell services to end users based on the capabilities of their own call control software as it interacts with the BOC switch. Under AIN, CONAP claims that each new application in the SCP will require some coordination with the switch vendor's generic software, so that parties wishing to develop new features will require BOC intermediation. [29] CONAP is also concerned that the implementation of AIN will impede the transition to a truly modular net-

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[22] Ameritech submitted this proposal in its comments to Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Notice of Proposed Rulemaking, 50 Fed. Reg. 33581 (Aug. 20, 1985).

[23] In addition to the FN/SI proposal of Ameritech, the Commission considered a proposal for a modular architecture supported by Hatfield in response to the Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*). Hatfield described an architecture that unbundled all basic network elements to allow and encourage the use of vendors' equipment, devices, software, or services in conjunction with the BOC network. According to Hatfield, this could be accomplished by creating natural modules in the system, physically and logically interconnected at well-specified interfaces.

[24] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958, at 1064, para. 213 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035, at 3055, para. 142 (1987) (*Phase I Reconsideration*).

[25] CONAP Petition at 6.

[26] Hatfield Report at iv, filed in the *Computer III* proceeding in response to the *Phase I Order*. *See supra* n. 22.

[27] Pactel Comments at 5.

[28] The "building blocks" of the existing local network architecture include customer premises equipment, local loop, central office switches, and interswitch transport media. Under a modular system, these components might be disaggregated into discrete modules that could include: (1) transport systems (such as ISDN, SS7, or Frame Relay); (2) switching nodes (such as an SPC digital switch or an optical switch); (3) switching node features (such as protocols or routing doctrines); and (4) support systems (such as Operations Support Systems or billing systems). Commenters should give examples of the kind of components they believe should comprise a modular architecture.

[29] *See* CONAP Petition at 22-30.

work because AIN is based on current switches, which it contends do not permit enhanced service providers equal access to basic network and switching systems functions.[30]

20. We seek comment on whether AIN or other future intelligent network architectures can and should be implemented in a way that provides network users with significantly greater access to the network than currently allowed. In general, we believe that greater access to the network could promote competition and the development of new and innovative services. However, we recognize that real-time third party control of LEC network switches may increase costs, and raises the possibility of compromising the reliability and integrity of the network. [31] We seek comment on the advantages and disadvantages of requiring Tier 1 LECs that implement AIN or other future architectures to do so in a way that promotes access by non-LECs.

21. For example, we seek comment on whether an AIN "gateway" could provide non-LECs with "mediated access" to the switch so that they could develop new call control features and functions practically independent of the LECs' control. By "mediated access" we mean that the non-LEC can gain access to the switch for these limited purposes, but is prevented by the gateway from engaging in activities that might compromise network reliability and integrity. Mediated access might allow access to the switch by non-LECs in one of many ways. For example, it might allow access through software in customer-provided SCPs. Another method might allow for collocation of non-LEC software in LEC SCPs. We seek comment on the costs and benefits of such systems and ask parties to comment on whether these approaches would significantly affect deployment of modular network architectures. Would an alternative to a "mediated access" arrangement be giving network users more flexibility to create new features through rapid deployment by LECs of ISDN loops, as one party suggests[32] We ask that those parties who believe that a form of "mediated access" to the network would be in the public interest, or who support other possible approaches, present a detailed proposal for a system that would permit such access.

IV. CONCLUSION

22. Our goal in this inquiry is to encourage development of future local exchange networks that are as open, responsive and procompetitive as possible, consistent with our other public interest goals, such as ensuring network reliability and integrity and avoiding the imposition of uneconomic costs. We initiate this inquiry to open debate on the interrelationship of ONA with emerging network design. Through this inquiry, we expect to gather information on future network capabilities that will be useful in our exploration of ways in which more open access may be provided through the intelligent networks of the future.

V. NOTICE AND COMMENT

23. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commisson's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before February 18, 1992 and reply comments on or before March 23, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information regarding this Notice of Inquiry, contact Marian Gordon (202) 632-4047, Policy and Program Planning Division, Common Carrier Bureau.

VI. ORDERING CLAUSES

24. Pursuant to Sections 1, 4(i) and (j), 201-205, 218, and 403 of the Communications Act as amended, 47 USC Sections 151, 154 (i) and (j), 201-205, 218, and 403, the Commission initiates this inquiry.

25. IT IS FURTHER ORDERED that the Petition for Investigation filed by CONAP is DENIED, except as provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

American Newspaper Publishers Association (ANPA)
Ameritech Operating Companies (Ameritech)
Association of American Railroads (AAR)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
GTE Operating Company (GTOC)

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[30] *See id.* at 24.

[31] *See, e. g.*, Pactel Comments at 6; SWBT Comments at 20-24.

[32] Unifi Communications Corporation Comments at 2 in response to ONA Further Amended Plans filed by the BOCs on April 15, 1991. Specifically, Unifi states that the ISDN Basic Rate Interface with the Q.932 set of Supplementary Services, as defined by the International Telegraph and Telephone Consultative Committee (CCITT), an international standards organization, should be made widely available to achieve the goals CONAP seeks to achieve through modularity in network design.

MCI Telecommunications Corporations (MCI)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
North American Telecommunications Association (NATA)
Pacific and Nevada Bell (Pactel)
Prodigy Services Company (Prodigy)
Southwestern Bell Telephone Company (SWBT)
Teleport Communications Group (Teleport)
US West Communications, Inc. (US West)

Reply Comments

American Telephone and Telegraph (AT&T)
Bell Atlantic
BellSouth
California Public Utilites Commission (California)
Coalition of Open Network Architecture Parties (CONAP)
MCI
MessagePhone, Incorporated (MessagePhone)
NATA
NYNEX
Pactel
SWBT
US West

Further Replies

CONAP
Information Industry Association (IIA)
MCI

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Intelligent Networks

I support enthusiastically this Notice of Inquiry into the future of telephone network architecture. I am particularly intrigued by the idea of a "modular and transparent" network architecture that could accommodate the applications of innovators outside as well as within telephone companies.

In its presentations to the Commission, the Coalition for Open Network Architecture Parties (CONAP) has cited two examples of modularity that it suggests as models for a "modular and transparent" future telephone network architecture.

CONAP's first example is today's modular stereo systems. Such systems can have components made by separate manufacturers, but which are perfectly compatible because of standard interfaces. From a consumer's point of view, a component stereo system is far superior to the old, self-contained hi-fi cabinet because it can be custom-crafted to fit the individual's needs. One impressive result is that consumers today can plug a CD player into a stereo system that was manufactured before CD players were invented.

CONAP's second example is drawn from IBM's experience with personal computers. IBM's decision to use an open architecture with published hardware and software interfaces turns out to have been a wise decision: It made IBM's system the world standard. It spawned an enormous number of new software companies. It stimulated a flourishing "aftermarket" in hardware and software, and encouraged widespread innovation. IBM's open approach has been good for IBM, good for its competitors, and good for consumers.

Can we draw analogies between these two examples and the telephone network? Could the same paradoxical openness that made IBM's strategy such a success work for telecommunications? Could a switch be built, for example, to accommodate software applications that are today unknown? Would a more open network increase usage of the network by unleashing the creative imagination of countless entrepreneurs? It may well be in the telephone companies' self-interest to increase their revenue streams by making their networks more open and modular. This proceeding should yield answers to these and other questions.

An issue that will loom large in this inquiry will be the question whether a more open network must necessarily be a less secure network. I am on record as favoring a strong role by the FCC in safeguarding network reliability and security. I would not want to do anything to jeopardize that security. But in this proceeding I will be interested not just in claims of threats to reliability--- I will also be interested in hearing about solutions, about ways to protect the network and its software from outside harm while making the network friendly to outside applications. We have already found ways to interconnect thousands of different private and public networks and to connect sophisticated customer equipment to the network without harm. I hope that the parties here will search for similar solutions.

Technology has moved us irresistibly toward a "network of networks." But the nation's public switched network, and the local exchange telephone companies, remain fundamental. That public network is one of this country's most valuable economic resources: a resource whose potential is virtually limitless. I am glad that we are asking in this proceeding how to make the very best use of that resource. I hope what we learn will enable us at once to improve and to protect that resource.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 4, 1991

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Lyle Reeb
General Manager
Radio Station KROQ-FM
3500 West Olive Avenue
Suite 900
Burbank, California 91505

In re: MM Docket No. 91-214
Inquiry into Broadcast of
Hoax Murder Confession over
Station KROQ-FM, Pasadena
California

Dear Mr. Reeb:

This is in reference to the Commission's inquiry into the broadcast by Station KROQ-FM, Pasadena, California, of a hoax murder confession. The inquiry was authorized pursuant to Section 403 of the Communications Act of 1934, as amended. See *Order,* FCC 91-225 (released July 17, 1991).

The evidence adduced as a result of this inquiry reveals that on June 13, 1990, Kevin Ryder and Gene ("Bean") Baxter, hosts of the "Kevin & Bean Show" on KROQ-FM, broadcast a segment called "Confess Your Crime" in which listeners were asked to confess on the air to transgressions they had committed. Among the telephone calls that were broadcast during the show was one purportedly from an anonymous listener confessing to the murder of his girlfriend. The broadcast of the murder confession precipitated widespread publicity as well as a costly and time consuming police homicide investigation.

In fact, the confession was a hoax, spontaneously conceived and executed by the two morning announcers without management's prior knowledge or consent. The "confessor" was identified as William Grimes a/k/a Doug Roberts, a friend of Ryder and Baxter who was an announcer at an Arizona radio station at the time of the broadcast and who shortly thereafter was hired as an announcer at KROQ-FM. Following the broadcast, the announcers made a concerted, and apparently successful, effort to conceal the truth from KROQ-FM's management as well as the public.

Management learned that the broadcast was a hoax perpetrated by the announcers in April 1991, after receiving certain incriminating information from law enforcement officials. Following an internal investigation, Infinity Broadcasting Corporation of Los Angeles temporarily suspended the announcers without pay, provided on-air apologies for the incident, and arranged for the announcers to provide a specified number of hours of community service and to provide full restitution to the Los Angeles Sheriff's Department for the cost of its homicide investigation. The licensee also agreed to underwrite the cost of preparing and distributing an educational pamphlet on the broadcast of false and misleading information to radio and television stations nationwide.

Based on the foregoing, it appears as a result of this inquiry that the licensee did not abdicate its basic responsibility to supervise its employees. Station KROQ-FM's broadcast of the hoax murder confession was a spontaneous, isolated event, orchestrated solely by certain on-air personnel, who subsequently engaged in a coverup. Neither station management nor the licensee knew, or had any reason to suspect, that the broadcast was actually a hoax. Further, upon learning that the broadcast was a hoax, management promptly effectuated disciplinary and remedial action. [1]

Nevertheless, the Commission has long viewed the type of deliberate distortion of programming that occurred in this case as inconsistent with the public interest. It is also well established that licensees are ultimately responsible for the actions of their employees. See *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). Furthermore, licensees will not be excused for past violations by reason of subsequent remedial action. See *Cate Communications Corp.*, 60 RR 2d 1386 (1986).

Accordingly, Infinity Broadcasting Corporation of Los Angeles, licensee of Station KROQ-FM, Pasadena, California, IS HEREBY ADMONISHED for broadcasting the type of false and misleading information which violates the Commission's general policy requiring licensees to program their stations in the public interest. See *Policy Statement and Order,* 57 RR 2d 939 (1985). It is expected that Infinity Broadcasting Corporation of Los Angeles will take such steps as are necessary to assure that such violation is not repeated. This matter is being made a part of KROQ-FM's permanent record.

This letter constitutes the full text of the Commission's report on the subject inquiry, pursuant to Section 404 of the Communications Act of 1934, as amended. This letter was adopted by the Commission on December 2, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

[1] The evidence does not reveal any nexus between Grimes' participation in the hoax and his subsequent employment at KROQ-FM.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTEL FEDERAL SYSTEMS — File No. I-T-C-91-141

Application for Authorization under Section 214 of the Communications Act of 1934, as Amended, to Establish Two-Way Channels of Communication Between the U.S. and the Bahamas in Support of a Government Service Having Article XIV(g) Exemption from INTELSAT Coordination

ORDER AND AUTHORIZATION

Adopted: December 3, 1991; Released: December 12, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by Contel Federal Systems (Contel) pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-91-141 is GRANTED and Contel is authorized to:

a. use the ASC-1 satellite to establish one E-1 (2.048 Megabits per second (Mbps)) circuit, between the earth station facilities in West Palm Beach, Florida, U.S. and the Bahamas to support the national security communications requirements of its customer; and

b. expand service on behalf of this particular customer between the U.S. and the Bahamas, provided that the Department of State notifies the Commission that the expanded service is solely to serve the national security communications needs of this customer.

2. IT IS FURTHER ORDERED that this authorization is granted pursuant to Article XIV(g) of the International Satellite Organization (INTELSAT) Agreement.[1]

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Article XIV(g) provides that the INTELSAT Agreement shall not apply " . . . to the establishment, acquisition or utilization of space segment facilities separate from INTELSAT space segment facilities solely for national security purposes". On May 28, 1991 the Department of State confirmed to the Federal Communications Commission that the requested service is in support of national security requirements and therefore, as per Article XIV(g) of the INTELSAT Agreement, no coordination with INTELSAT is required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WEST TEXAS RURAL TELEPHONE
COOPERATIVE, INC.,
Complainant,

v. File No. E-88-80

AMARILLO CELLTELCO,
Defendant.

ORDER

Adopted December 6, 1991; Released: December 12, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. West Texas Rural Telephone Cooperative, Inc. (West Texas) filed the above-captioned complaint against Amarillo Celltelco (Amarillo) concerning the manner in which it was marketing its cellular telephone service. On October 2, 1991, Amarillo filed a Motion to Dismiss the complaint on the ground that the issue raised in the complaint is now moot. By letter dated October 17, 1991, West Texas agrees with Amarillo that the matter is now moot and should be dismissed.

2. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-referenced complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-347

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Modify
Processing Procedures for Commercial
FM Broadcast Applications

NOTICE OF PROPOSED RULE MAKING

Adopted: November 21, 1991; Released: December 12, 1991

Comment Date: February 3, 1992
Reply Date: March 4, 1992

By the Commission:

1. We institute this proceeding, on our own motion, to reexamine our rules concerning the acceptance and amendment of applications to construct commercial FM radio stations. Since 1985, our staff has processed these applications using a strict approach known as the "hard look."[1] In this *Notice*, we acknowledge recent changes in the quality and quantity of commercial FM applications, and determine that more lenient standards may now be appropriate.[2]

BACKGROUND

2. The "hard look" approach was designed to facilitate the processing of large numbers of FM applications at a time when carelessly prepared and/or speculative applications were received frequently, and when acceptance of curative amendments often resulted in significant processing delays. Thus, the "hard look" processing system takes a tough stand on defective applications and provides only limited opportunity for amendment.

Current Procedures

3. Under "hard look" procedures, the Commission announces a fixed filing period, or "window", during which it will accept applications to construct a new commercial FM radio station in a particular community. *See* 47 C.F.R. § 73.3573(g). While the window is open, applicants may amend their applications at will. *See* 47 C.F.R. § 73.3522(a)(6). However, upon close of the window, the Commission's staff begins its review of the applications and, pursuant to procedures outlined below, further opportunity for amendment is extremely limited.

4. First, the staff performs a "tender review." At this stage, the staff determines whether the application is "substantially complete" by examining it for inclusion of approximately two dozen items deemed necessary to begin processing. These items and the reasons for their importance are set forth in Appendix D of the *Order* implementing the "hard look." *See Hard Look Order*, note 1 *supra*, 50 Fed. Reg. at 19945.[3] Under the "hard look" approach, applicants may not submit amendments to correct tender defects after the close of the filing window. Therefore, the staff returns applications containing such defects.[4] Applications free of tender defects are thereafter placed on a publicly released "Notice of Tenderability." This Notice triggers a 30-day period in which applicants with substantially complete applications may submit amendments as a matter of right. *See* 47 C.F.R. § 73.3522(a)(6).

5. After the amendment of right period, applications proceed to the second stage of review. Applications that were found "tenderable" are placed on a publicly released "Notice of Acceptance," which triggers the time for filing of Petitions to Deny pursuant to Section 309 of the Communications Act. Thereafter, the staff studies the applications for "acceptability," *i.e.*, compliance with core technical and legal requirements for FM facilities. This review includes such critical factors as the application's compliance with international treaties and adherence to Commission rules involving power, height, and spacing.[5] If an application is found to be technically unacceptable, the staff will dismiss it as defective. Our current rules do not permit amendments that correct acceptability defects after close of the 30-day amendment of right period. *See* 47 C.F.R. § 73.3522(a)(6).

6. Applications which have passed the tender and acceptance review stages are ready for final processing. If only one applicant has submitted a satisfactory application during the filing window, the staff grants that application. *See* 47 C.F.R. § 73.3573(g)(2). In cases where more than one applicant has filed a satisfactory application during the window, the applications are considered mutually exclusive and are subject to a comparative hearing to determine the best applicant. *Id.* If no one has filed an application during the window period, the Commission considers future applicants for that allotment on a first come, first served basis, and grants a construction permit to the first qualified applicant to file after close of the window.[6] *See* 47 C.F.R. § 73.3573(g)(3). The Commission also considers on this first come, first served basis applications seeking to modify existing FM facilities.

DISCUSSION

Evaluation of the "Hard Look"

7. We believe that the "hard look" approach has now achieved its originally intended purposes. It has encouraged applicants to submit non-defective applications, discouraged speculation, and established an equitable mechanism for determining filing rights of conflicting applications. By significantly improving administrative efficiency, the "hard look" made it possible for our staff to handle a substantial increase in the volume of commercial FM applications which began in 1985.

8. The "hard look" has been criticized, however, because it results in dismissal of many applications for what would otherwise be correctable errors. A small oversight, such as failure to check a box on the application form, can result in dismissal without a chance to amend. At the time we adopted the "hard look," we recognized that its tender requirements were harsh but stated that "such an outcome cannot be avoided if we are to achieve the benefits of the new . . . processing procedures." *Hard*

Look Order, Appendix D, 50 Fed. Reg. at 19945. In view of recent developments affecting FM applications, however, we believe that this balance of benefits and costs has changed and that we may be able to return to a more flexible processing system without unduly increasing the burden on the Commission's processing staff.

9. *Volume of Applications*. The first development of which we take note is a substantial decrease in the volume of FM applications to be processed. When the Commission adopted the "hard look," it needed a mechanism to handle a dramatic increase in applications expected from the allocation of 689 new FM channels in BC Docket 80-90.[7] The Docket 80-90 allocation, coupled with other applications for new stations, raised the average number of applications for new stations received per year to 1441 during the period 1985 to 1988 -- 54% above the average for the previous four years. During 1988 alone, over 2100 such applications were filed. Even with the significant relief provided by the "hard look," the sheer volume of applications, coupled with the limited size of our processing staff, created a peak backlog of nearly 2500 applications.

10. Today, in contrast, the volume of FM applications filed and pending is considerably smaller. All of the filing windows for the Docket 80-90 channels have closed and the Mass Media Bureau is currently receiving an average of only 450 applications for new FM stations per year. The number of applications currently pending is approximately 600, the lowest it has been since 1977. In view of this decreased volume of applications, consideration of curative amendments prohibited under the "hard look" procedures may now be possible without concomitant processing delays.

11. *Speculative Applications*. There also have been recent procedural and substantive changes which obviate the need for the "hard look" as a deterrent to speculation. When adopted, the "hard look" was viewed as a method of weeding out speculators, who often submitted hastily prepared applications containing errors. *See Hard Look Order*, 50 Fed. Reg. at 19940. While the dismissal of such applications without a further chance to amend certainly has an impact on speculators, it affects legitimate applicants as well.

12. Recent Commission actions in other proceedings address the issue of speculation more directly and with less impact on legitimate applicants. The Commission recently limited the payment an applicant can receive for withdrawing an application.[8] This removes a previously existing incentive for applicants to file for the sole purpose of effectuating a monetary settlement. The Commission also now requires applicants to pay the statutory $6,760 hearing fee early in the application process, making it less likely that frivolous applicants will file.[9] Finally, the Commission has revised the broadcast application form to require additional financial information.[10] This requirement operates to prevent filings by speculators who cannot clearly document their financial ability. We expect that these recent developments will reduce substantially the problem of speculation, making the "hard look" less necessary for this purpose.

13. *Application Quality*. A third occurrence prompting our initiation of this proceeding is an appreciable increase in the overall quality of commercial FM applications. The "hard look" was adopted, in part, because the quality of these applications was low, thereby placing a burden on our staff and delaying initiation of new and upgraded service. *See Hard Look Order*, 50 Fed. Reg. at 19938-40. At the time of the "hard look's" adoption, the staff initially returned 40% of all commercial FM applications as unprocessable. Today, however, applicants and their agents have experienced more than five years of "hard look" processing and appear to have gained in that time a much better understanding of our requirements. Currently, it is necessary for our staff to return only 5% of the commercial FM applications received. While the "hard look" was primarily responsible for this improved application quality, it does not necessarily follow that retention of the "hard look" is needed to maintain a reasonably high quality level. If adoption of a new standard does cause the number of defective applications to rise significantly, however, it may be necessary to reimplement a tougher standard of review. *See* para. 28 *infra*.

14. *Summary*. We tentatively conclude that, while the "hard look" approach has been successful in accomplishing its original goals, intervening changes in circumstance now permit us to accomplish our present processing goals in a less restrictive manner. Accordingly, we propose to modify our rules to provide more lenient standards for amendment and acceptance of defective commercial FM applications.

Options for New FM Procedures

15. We first consider the degree of liberalization that might be appropriate and the methods that would best implement such a change in the processing of commercial FM applications. Policies and procedures used to process defective applications in other broadcast services provide models for us to draw upon.[11]

16. *TV Processing Approach*. Should we decide that a lenient approach is appropriate for commercial FM applications, we might adopt the procedures now applied to defective TV applications. The TV approach aims to ensure the greatest number of qualified applicants from which to choose and, therefore, permits applicants to correct many types of defects and does not preclude multiple amendments for this purpose. *See generally Azalea Corp.*, 31 FCC 2d 561, 563 (1971). The Commission returns only one percent of TV applications as either not substantially complete or unacceptable for filing. Due to the relatively small number of TV applications received, the lenient approach toward defective applications used in the TV service does not lead to undue delay for applicants who file initially complete and acceptable applications.

17. The procedure used to identify defective applications under the TV approach depends upon whether the application is subject to a comparative hearing. For applications subject to comparative hearings, the TV processing staff uses the Hearing Designation Order as a vehicle for identifying defects and for deciding how those defects can be corrected. For TV applications not subject to a hearing, the staff sends a deficiency letter to the applicant.

18. *AM Processing Approach*. A somewhat less lenient option would be a return to the approach that was used to process commercial FM applications prior to adoption of the "hard look." This approach, which is currently applied to defective applications in both the AM and the noncommercial educational FM services, gives applicants one opportunity to file a corrective amendment

(hereinafter "the AM approach"). The AM approach is thus stricter than the TV approach but more lenient than the "hard look."

19. Under the AM approach, staff action on defective AM and noncommercial FM applications depends upon the nature of the defect. For small defects, *i.e.*, if the application is substantially complete and meets all core technical acceptance criteria, the staff will send a deficiency letter giving the applicant 30 days to correct the small defect in question. For more significant defects, *i.e.*, those going to substantial completeness or technical acceptability, the staff returns the application as either not substantially complete or unacceptable for filing. It is our policy under the AM approach, however, to give an applicant one opportunity to have its returned application reinstated *nunc pro tunc*. To obtain this opportunity, the applicant must, within 30 days of the date of return, submit a petition for reconsideration together with an amendment to cure the defect in substantial completeness or in acceptability, provided that the amendment does not constitute a major change to the application. *See Public Notice*, Patently Defective AM and FM Construction Permit Applications, FCC 84-366, 49 Fed. Reg. 47331 (December 3, 1984). There is currently a freeze on the filing of applications for new AM stations which we expect will be lifted in early 1992. *See Report and Order*, AM Broadcast Services, MM Docket No. 87-267, slip op. at para. 221 (October 25, 1991). Prior to the freeze, however, approximately 40 percent of all AM applications were initially returned as defective.

20. *Hybrid Processing Approach.* A third possible standard that we are considering is a hybrid approach, which borrows aspects of existing processing approaches and combines them with procedures tailored to the commercial FM environment. Under such an approach, we would select only those aspects of existing approaches that would most easily transfer to commercial FM processing. To these existing procedures we could then add new procedures designed specifically for commercial FM applications.

Evaluation of Options

21. We have considered each of the options above and tentatively conclude that a hybrid approach would be best. Such an approach is attractive because it permits the Commission to choose the most beneficial aspects of existing approaches without also adopting other aspects that would be less applicable to the commercial FM service. Additionally, the hybrid approach is the only identified option that would allow us to address factors unique to commercial FM applications.

22. Although the TV approach works very well in that service, we do not believe that it is completely compatible with commercial FM applications. This is due primarily to the fact that, despite the recent decrease in the volume of commercial FM applications, we still receive a significantly larger number of applications for commercial FM stations than for TV or AM stations. The multiple amendments permitted under the TV approach are best suited to a service receiving relatively small numbers of applications. Were we to allow multiple corrective amendments to the large number of commercial FM applications received, we would create significantly more work for our FM processing staff and delay initiation of new and upgraded service. Similarly, the AM approach has several attractive features but we question whether every aspect of it would transfer to the commercial FM service. For example, in view of the larger number of FM applications received, it might not be time efficient to dismiss commercial FM applications and to hold those applications and their mutually exclusive groups in abeyance pending possible *nunc pro tunc* reinstatement.

23. We therefore propose to adopt a hybrid approach that incorporates aspects of both the AM and the TV procedures but is also tailored to the commercial FM service. We consider in this *Notice* two such possible approaches. Both of these alternatives, which are discussed in greater detail below, borrow from the AM approach's single opportunity for amendment and from the TV approach's method of processing.[12] We welcome comments on these two approaches, as well as on the other alternatives presented. We would also welcome and consider approaches other than those specifically identified here. Such proposals should, of course, be as specific as possible and provide clear analysis of the benefits and drawbacks of the method proposed.

Proposal

24. Under our proposal, the staff would continue to examine applications for new and modified commercial FM facilities using the same "hard look" tender and acceptability criteria used today. However, applicants would have a limited opportunity to amend tenderability and acceptability defects.[13] We present for public comment two possible ways in which to effectuate this opportunity, without placing an undue burden on our processing staff or causing significant delays to competing applications. The two options are similar in most respects. However, whereas Option 1 gives applicants one opportunity to amend at the tender stage and one opportunity to amend at the acceptability stage, Option 2 combines these two stages of review and gives the applicant one overall opportunity for corrective amendment.

25. *Option 1.* Under the first option, the Commission would continue to perform a tender review shortly after receipt of the applications. If we find an application to contain one or more tender defects, we would send a deficiency letter giving the applicant 30 days to perfect the application's tenderability. While the staff would attempt to identify all such defects and to explain the basis for the return of the application, it would remain the applicant's responsibility to ensure substantial completeness through adherence to the present tenderability criteria. Thus, we would require the applicant to use its one opportunity for amendment to correct *all* tender defects, including any that, for whatever reason, the staff may not have identified. Thereafter, we would place on a publicly released "Notice of Tenderability" each application that becomes substantially complete through a timely filed amendment and any mutually exclusive applications. We would return any applications not complying with our proposed policy, such as those with late filed amendments and those that were still not substantially complete as amended.

26. As under current commercial FM procedures, we would permit applicants to amend substantially complete applications as a matter of right during the 30-day period following release of the "Notice of Tenderability." *See* 47 C.F.R. § 73.3522(a)(2). Following this period, the Commission would release the "Notice of Acceptance" permitting petitions to deny and thereafter examine applications for compliance with our core technical and legal requirements. Rather than dismissing applications

found to contain acceptability defects, however, we would thereafter permit applicants one opportunity to file an amendment correcting all defects, including any not specifically identified. For applications not subject to a comparative hearing, the staff would send each applicant a deficiency letter, giving it 30 days to file a corrective amendment. For applications subject to hearing we would vary the process somewhat so as not to delay an entire group of mutually exclusive applications. For these applications, the staff would specify in the Hearing Designation Order an issue as to the acceptability defect in question which could be corrected as a matter of right by a curative amendment within 30 days of release of that Order. *See* 47 C.F.R. § 73.3522(b)(2). Applicants unable to correct all acceptability defects within this one time opportunity would be dismissed without opportunity for reinstatement *nunc pro tunc*.

27. *Option 2*. Our second option would be similar to the first option just described, except that it would combine the tender and acceptability review into one stage. To do this, we would place applications received on a publicly released "Notice of Receipt," not yet making a judgment as to whether they are substantially complete. The current period for amendment as of right would follow the "Notice of Receipt." After that period, the staff would issue a "Notice of Tenderability and Acceptance" permitting petitions to deny. The staff would thereafter examine applications for compliance with existing tenderability criteria and begin to process substantially complete applications. Examination and processing of the application would proceed to the point at which missing or inconsistent information would prevent the staff from further processing that application. At that point, we would issue a deficiency letter giving the applicant one opportunity to correct the discovered errors and all other tender and/or acceptability errors that may exist. As discussed in Option 1, we would require the applicant to use this one opportunity to correct *all* defects, including any that, for whatever reason, the staff may not have identified. Any application still containing tender or acceptability errors after this one opportunity would be dismissed with no further opportunity to amend.

28. We solicit comments on the approaches discussed herein. We are especially interested in comments addressing the anticipated quality of applications under a new approach. If the overall quality of commercial FM applications submitted under a new approach remains at current levels or moderately decreases, we believe that we could implement this change within existing staff resources. In view of our experience with AM applications, however, we do have some lingering concerns about FM application quality under the proposed procedures. As noted above, the AM service has a similar opportunity for corrective amendments and, prior to the current freeze on new AM applications, 40 percent of the AM applications received had to be returned as defective. On the other hand, we realize that AM applicants have never been subject to the tempering experience of "hard look" procedures. In any event, were the number of defective FM applications to rise markedly under a new approach,[14] we would not have the resources to continue that approach and may have to consider reimplementing "hard look" procedures. Accordingly, we ask for comment on how the Commission might implement a new approach for commercial FM applications without sacrificing application quality. We also ask commenters to consider whether particular situations warrant elaboration and/or exceptions to the general standards outlined above. We have on our own identified the following matters requiring additional discussion.

29. *Modification Applications*. First, we consider the effect that our proposal would have on applicants seeking to modify existing facilities. Under the current "hard look" policy, modifications are handled on a first come, first served basis with grant of the first non-defective application filed. Were we to apply our proposed approach to modification applications, however, a previously filed but defective application mutually exclusive with a later filed non-defective application could, by corrective amendment, prevail over that later filed application. We currently believe that the proposed approach should be applied across the board to all commercial FM applications, including modification applications, but ask commenters to address the potential impact of this choice.

30. *Waiver Requests*. Our rules permit applicants to submit applications accompanied by waiver requests, asking us to approve facilities that are not entirely consistent with our rules. *See* 47 C.F.R. § 73.3566(a). Defects resulting from denial of such waiver requests would fall outside the scope of our proposal. Our proposal seeks to give FM applicants one opportunity to correct *inadvertent* tenderability or acceptability errors. Waiver requests are not inadvertent but, rather, are in and of themselves "bites at the apple," requiring additional staff consideration. Accordingly, we clarify that our proposed approach would be inapplicable to defects that result from denial of a waiver request. We will dismiss applications containing denied waiver requests that render the application untenderable or unacceptable unless the application includes, as an alternative to the waiver request, all the information necessary to render the application tenderable or acceptable for filing.

31. *Minimum Filing Requirements and Uncorrectable Defects*. Our proposal, while liberalizing the acceptance of corrective amendments, would by no means permit corrective amendments for every type of defect that might arise. There are certain defects, such as improper fee payment and defects involving time-dependent aspects of an application, that cannot be cured by an after the fact submission. *See, e.g.*, 47 C.F.R. § 1.1107(b). For example, as a prerequisite of filing, applicants must show that they are financially qualified *as of the time of application*. *See Report and Order*, Revision of Application for Construction Permit, GEN Docket 88-328, 4 FCC Rcd 3853, 3859 (1989). Applicants not financially qualified at the time of application cannot cure this problem by supplying us with an amendment that reveals financial qualifications acquired subsequent to the time of the filing of the application. Similarly, an applicant could not cure through amendment the timing defect of a premature or late filed application.

32. We also are considering whether to adopt certain minimum requirements that FM applicants will have to meet at the time of initial filing. Applications meeting such minimum requirements might be less than substantially complete but would demonstrate a reasonable effort by the applicant to provide us with basic information. Applicants not meeting such minimum requirements will be returned to the applicant without the opportunity to amend. Examples of specific information that we might consider critical to meeting these minimum requirements are the applicant's name, address, signature, and inclusion

of the engineering and legal sections of the application. We solicit comments on whether the Commission should adopt such a list of minimum filing requirements and, if so, what information should be necessary to meet those requirements.

33. *Applicant - Discovered Deficiencies.* We also wish to clarify that applicants who find defects on their own and who attempt to correct these defects prior to Commission intervention do not thereby expend their one opportunity to amend. Were we to permit only one such amendment and to consider it as the applicant's "one bite at the apple," we might, in effect, be penalizing applicants for their diligence. Therefore, we clarify that our proposed one opportunity to amend would attach upon our staff's issuance of a deficiency letter or Hearing Designation Order. We will treat amendments received prior to that time, which successfully correct defects, as amendments for good cause pursuant to 47 C.F.R. § 73.3522(a)(6). Amendments not making a good cause showing or not otherwise provided for in our rules will continue to be unacceptable outside of the amendment of right period.

34. *Pending Applications.* The final matter to consider is whether our proposal, if adopted, should have an effect on currently pending applications and appeals. We tentatively conclude that it should not.[15] A decision to process applications under the rules in effect on their date of receipt would be more efficient for our staff. Were we to apply the new rules to applications filed prior to the effective date of the new rules, we might unduly delay selection of the ultimate licensee and the initiation of new service. We propose, therefore, that any new rules adopted in this proceeding should apply only to applications received after the implementation of those rules.

CONCLUSION

35. In sum, we propose to make our processing rules for commercial FM applications more forgiving of defects in the initial application. Under the approach tentatively selected, we would give applicants an additional chance to correct defects going to an application's tenderability and acceptability. This new approach would apply to all applications received after implementation of any new rules adopted.

PROCEDURAL MATTERS

36. As required by Section 603 of the Regulatory of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. We request written public comments on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq* (1981).

37. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

38. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **February 3, 1992** and reply comments on or before **March 4, 1992.** Extensions of these time periods are not contemplated. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

39. For further information on this proceeding, contact Irene Bleiweiss, Audio Services Division, Mass Media Bureau, (202) 632-6485.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the requirements of the Regulatory Flexibility Act of 1980, the Commission finds as follows:

Reason for Action

The Commission is initiating this rule making proceeding to consider whether to make its rules more liberal with respect to the acceptance and amendment of defective applications to construct commercial FM facilities. Consideration of this rule change is prompted by recent changes in the quality and quantity of these applications.

Objectives

The Commission seeks public comment on its tentative conclusion that the strict "hard look" processing procedures are no longer necessary and on proposals to institute a processing approach that is more forgiving of errors in commercial FM applications.

Legal Basis

The proposed action is authorized under sections 4(i), 4(j), 301, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

No new requirements.

Federal rules which overlap, duplicate, or conflict with this rule

None.

Description, potential impact, and number of small entities involved

The Commission believes that adoption of the proposals set forth in this *Notice* would benefit small entities interested in acquiring new FM commercial broadcast licenses and small entities already licensed for commercial FM facilities who wish to modify their current authorizations. The proposal would allow such applicants a limited opportunity to amend defective applications to correct inadvertent errors. Currently, these same errors would be unamendable and would result in dismissal of the application. The proposal would result in a small increase in processing time, pending the amendment of defective applications.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

The *Notice* solicits comments on a variety of alternatives.

FOOTNOTES

[1] *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19940 (May 13, 1985) (*Hard Look Order*), *recon. denied*, 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without published opinion sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985).

[2] Today's proposal would not affect non-commercial educational FM applications because these applications are not subject to the "hard look" approach. Such applications are processed in a manner virtually identical to AM applications. *See* paras. 18-19, *infra*.

[3] Among the tender requirements are the applicant's name and address; channel number and community of license; certifications of compliance with alien ownership restrictions, local public notice provisions, financial ability to construct and operate, and site availability; listing of other interests in broadcast facilities; and engineering data such as geographic coordinates, transmitter site map, power levels, and antenna height.

[4] Under the "hard look," applicants with defective applications still have several limited ways in which they can participate in the proceeding on a waiver basis. *See Public Notice*, Commission Announces Four Policy Changes, 5 FCC Rcd 990 (1990). For example, a dismissed applicant whose dismissal is not final may buy out all remaining applicants in a mutually exclusive group. *Id.*

[5] *See Public Notice*, Patently Defective AM & FM Construction Permit Applications, 49 Fed. Reg. 47331 (December 3, 1984). Alien ownership or control has also been deemed an acceptability criterion. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988).

[6] If only one application is received during the window and that application contains tender or acceptability defects, it is our policy to give the applicant one opportunity to correct the defects. *Public Notice*, Commission Announces Four Policy Changes, 5 FCC Rcd 990 (1990). If more than one application is filed during the window and all are found to contain tender or acceptability defects, the Commission returns the defective applications and opens a 7 day "mini-window" for the filing of new applications. *Public Notice*, Operation of "First Come/First Serve" FM Broadcast Application Processing System, 51 Fed. Reg. 23764 (July 1, 1986).

[7] *See Hard Look Order*, note 1 supra, *50 Fed. Reg. at 19938. The First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985), implemented our decision in BC Docket No. 80-90, 94 FCC 2d 152 (1983).

[8] *See Report and Order*, Settlement Agreements, MM Docket No. 90-263, 6 FCC Rcd 85 (1990), *modified in part, Memorandum Opinion and Order*, MM Docket No. 90-263, 6 FCC Rcd 2901 (1991).

[9] *See Report and Order*, Proposals to Reform the Commission's Comparative Hearing Process, GEN Docket No. 90-264, 6 FCC Rcd 157 (1990); *recon. granted in part and denied in part, Memorandum Opinion and Order*, GEN Docket. No. 90-264, 56 Fed. Reg. 25635 (June 5, 1991).

[10] *See Report and Order*, Revision of Application for Construction Permit, GEN Docket No. 88-328, 4 FCC Rcd 3853 (1989); *recon. denied, Memorandum Opinion and Order*, GEN Docket No. 88-328, 5 FCC Rcd 7267 (1990).

[11] Other broadcast services differ from commercial FM not only in the way they handle defective applications but also in the manner in which applications are filed. Our consideration of procedures in other services extends only to their handling of defects. We do not, for example, propose to change the filing "window" and first come, first-served policy, which have worked well for commercial FM applications. *See* 47 C.F.R. § 73.3573(g).

[12] Neither of the proposed approaches is radically different from our current AM procedures, with the applicant being given a limited opportunity to correct defects under each approach. In comparison to the AM approach, however, the two hybrid procedures would be more streamlined for the Commission's processing staff, and therefore more suited to the larger number of FM applications received.

[13] However, no amendment could impermissibly conflict with a previously filed acceptable application. *See generally* 47 C.F.R. § 73.3522(a)(6). The Commission currently applies a similar approach, but on a waiver basis, when there is only one applicant who applies within a filing window. *See Public Notice*, Commission Announces Four Policy Changes, 5 FCC Rcd 990 (1990). Section 73.3522(a)(6) of our rules provides that an amendment cannot produce a conflict with an applicant who filed subsequent to the initial application but prior to the amendment. For example, an applicant could not move its site to a location that would result in its being short spaced with an acceptable application in *another* proceeding. An amendment continuing short spacing with an applicant within the *same* proceeding, however, would not produce a new conflict because applicants filing within the same window are by definition in conflict with each other.

[14] At this juncture, we would propose to define a marked decrease in quality as one necessitating return of more than 15% of the applications received.

[15] We also note, of course, that relaxation of the "hard look" approach for the processing of applications in the FM service is not intended to reflect a change in our policies of licensing

other radio services. *See, e.g.*, Selection of Mutually Exclusive Competing Cellular Applications, CC Docket No. 83-1096, 50 Fed. Reg. 20760 (May 20, 1985) (cellular "letter perfect" standard).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-523

In the Matter of

Amendment of Section 73.202(b), RM-6929
Table of Allotments,
FM Broadcast Stations.
(Royston, Georgia)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 5, 1991; Released: December 13, 1991

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration [1] filed by Voyager Communications III, Inc. ("Voyager"), licensee of Station WLWZ(FM), Channel 280A, Easley, South Carolina, of the *Report and Order* in this proceeding, 5 FCC Rcd 5838 (1990). The *Report and Order* substituted Channel 279C3 for Channel 279A at Royston, Georgia, and modified the license of Station WPUP(FM), Channel 279A, Royston, accordingly. Athena Broadcasting Corporation, Inc. ("Athena"), licensee of Station WPUP(FM), submitted an opposition to Voyager's petition for reconsideration and Voyager filed a reply.

2. In its petition for reconsideration, Voyager requested that a site restriction of 19.7 kilometers (12.2 miles) west be placed on the Channel 279C3 upgrade at Royston. Voyager claims that this site restriction will allow Station WLWZ to relocate to a fully spaced site and operate as a 6 kilowatt Class A FM station.

3. Voyager subsequently filed a settlement agreement requesting withdrawal of its petition for reconsideration. In this agreement, Athena agrees to amend its application to specify a site that will not conflict with an Easley 6 kilowatt facility.

4. Voyager failed to file a statement that this settlement agreement conforms to Commission Rule 1.420(j). However, we note that Athena has received a construction permit for Channel 279C3 at Royston at a site identical to the non-conflicting site specified in the settlement agreement (BPH-901213IC). Since Athena has a construction permit at the non-conflicting site, we believe Voyager's petition for reconsideration is moot and, therefore, we will dismiss the petition.

5. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Voyager Communications III, Inc., IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public Notice was given November 26, 1990, Report No. 1830.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-358

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Atlantic, Atlantic Beach and Hatteras, North Carolina) RM-7867

NOTICE OF PROPOSED RULE MAKING

Adopted: December 4, 1991; Released: December 13, 1991

Comment Date: February 3, 1992
Reply Comment Date: February 18, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert L. Purcell ("petitioner") requesting the allotment of Channel 297C1 to Atlantic Beach, North Carolina, as the community's first local FM service. To accommodate the allotment at Atlantic Beach, petitioner also requests the substitution of Channel 233A for unoccupied but applied for Channel 297A at Atlantic, North Carolina, and the substitution of Channel 268A for unoccupied but applied for Channel 232A at Hatteras, North Carolina.

2. Petitioner failed to state its intention to apply for Channel 297C1, if allotted to Atlantic Beach. and should correct this deficiency in comments. *See* paragraph 2 of the attached Appendix. Petitioner also failed to submit a signed statement verifying that the statements made in his petition were correct to the best of his knowledge. *See* Section 1.52 of the Commission's Rules. Therefore, petitioner is requested to correct both procedural deficiencies in his comments. Failure to do so could result in dismissal of the petition.

3. We believe the public interest would be served by proposing the allotment of Channel 297C1 to Atlantic Beach, North Carolina, since it could provide the community with its first local FM transmission service. Channel 297C1 can be allotted to Atlantic Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.8 kilometers (17.9 miles) northeast to avoid a short-spacing to Station WNCT-FM, Channel 300C, Greenville, North Carolina. Channel 268A can be allotted to Hatteras, North Carolina, without the imposition of a site restriction. We note that Channel 268A may also be used at the site specified in the pending Hatteras application (BPH-910305MA). Channel 233A can be allotted to Atlantic, North Carolina, with a site restriction of 0.6 kilometers (0.4 miles) east to avoid a short-spacing to Station WRNS-FM, Channel 236C, Kinston, North Carolina. [1] However, Channel 233A cannot be used at the site specified in the pending Atlantic application (BPH-900919MH). A copy of this *Notice* will be sent to the applicants for Channel 232A at Hatteras and Channel 297A at Atlantic.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Atlantic, North Carolina	297A	233A
Atlantic Beach, North Carolina	--	297C1
Hatteras, North Carolina	232A, 246C1	246C1, 268A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 3, 1992,** and reply comments on or before **February 18, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert L. Purcell
15010 Carrolton Road
Rockville, Maryland 20853
(Petitioner)

7. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 232A at Hatteras and Channel 297A at Atlantic, as follows:

Hurricane Communications
2557-E Mountain Lodge
Birmingham, Alabama 35216

Down East Radio Company
Rt. 3, Box 135
Beaufort, North Carolina
28516

[1] The coordinates for Channel 297C1 at Atlantic Beach are North Latitude 34-48-17 and West Longitude 76-27-13. The coordinates for Channel 268A at Hatteras are 35-12-54 and 75-41-30. The coordinates for Channel 233A at Atlantic are 34-53-30 and 76-20-00.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act o Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-359

In the Matter of

Amendment of Section 73.202(b), RM-7835
Table of Allotments,
FM Broadcast Stations.
(Hinesville, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 4, 1991; Released: December 13, 1991

Comment Date: February 3, 1992
Reply Comment Date: February 18, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Bullie Broadcasting Corporation ("petitioner"), permittee of Channel 284A, Hinesville, Georgia, requesting the substitution of Channel 284C3 for Channel 284A at Hinesville, and the modification of its construction permit (BPH-890504MN) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted. [1]

2. We believe the public interest would be served by proposing the substitution of Channel 284C3 for Channel 284A at Hinesville, Georgia, because it could provide the community with a wide coverage area FM service. Channel 284C3 can be allotted to Hinesville in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.8 kilometers (7.9 miles) west [2] to avoid short-spacing to Station WFYV(FM), Channel 283C, Atlantic Beach, Florida. Channel 284C3 at Hinesville would be short-spaced to Channel 285A, Station WHCG(FM), Metter, Georgia. However, Station WHCG was ordered in MM Docket No. 89-418 to specify operation on Channel 279A. *See* 6 FCC Rcd 5793 (1991). Therefore, the grant of a license for Channel 284C3, Hinesville, Georgia, may be withheld until Station WHCG(FM) is licensed on Channel 279A at Metter, Georgia. We shall also propose to modify petitioner's construction permit (BPH-890504MN) to specify operation on Channel 284C3 in lieu of Channel 284A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Hinesville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hinesville, Georgia	222C2, 284A	222C2, 284C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 3, 1992,** and reply comments on or before **February 18, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Geoffrey Bentley
Debra J. Jezouit
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(Attorneys for petitioner)

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to Radio Metter, P.O. Box 238, Metter, Georgia 30401 (licensee of Station WHCG(FM)).

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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[1] Petitioner's request was originally returned by letter because it was dependent upon final action in MM Docket No. 89-418. *See* Letter from Chief, Allocations Branch, to counsel for Bullie Broadcasting Corporation (July 10, 1991). Petitioner filed a petition for reconsideration of the action and requested reinstatement of its petition. After petitioner filed its petition for reconsideration, we issued a *Report and Order* in MM Docket No. 89-418. *See* 6 FCC Rcd 5793 (1991). As that proceeding is now final, we may issue this *Notice* seeking comment on petitioner's proposal. We will dismiss petitioner's petition for reconsideration as moot at the termination of this proceeding.

[2] The coordinates for Channel 284C3 at Hinesville are North Latitude 31-52-18 and West Longitude 81-43-46.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-238

In the Matter of

Amendment of Section 73.202(b),	RM-7691
Table of Allotments,	
FM Broadcast Stations.	
(Colfax, Washington)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 6, 1991; Released: December 13, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Dakota Communications ("petitioner"), permittee of Station KRAO,[1] Channel 272A, Colfax, Washington, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4923 (1991), proposing the substitution of 273C3 for Channel 272A at Colfax and the modification of its construction permit for Station KRAO to operate on the higher powered channel. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 273C3 for Channel 272A at Colfax, Washington, since it would provide the community with a wide coverage area FM transmission service. Channel 273C3 can be allotted to Colfax in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site without the imposition of a site restriction. [2] Since Colfax is located within 320 kilometers (200 miles) of the U.S.-Canadian government, concurrence of the Canadian government has been obtained. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KRAO at Colfax to specify operation on Channel 273C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Colfax, Washington	273C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Dakota Communications for Station KRAO, Colfax, Washington, IS MODIFIED to specify operation on Channel 273C3, in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In the *Notice*, the station call letters were incorrectly referred to as KRAQ instead of KRAO.
[2] The coordinates for Channel 273C3 at Colfax are North Latitude 46-51-43 and West Longitude 117-10-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-290

In re Applications of

KEVIN POTTER File No. BPH-880706MC

MARK RODRIGUEZ, JR. File No. BPH-880707MJ

For Construction Permit for
New FM Station, Channel 300C2,
Gainesville, Texas

Appearances

Lauren A. Colby, Esquire, on behalf of Kevin Potter; and *James A. Gammon, Esquire*, on behalf of Mark Rodriguez, Jr.

DECISION

Adopted: December 4, 1991; Released: December 13, 1991

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE. Board Member BLUMENTHAL Concurring Dubitante with Statement.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 6 FCC Rcd 5252 (1991) (I.D.), of Chief Administrative Law Judge Joseph Stirmer (ALJ), as well as exceptions thereto filed by Mark Rodriguez, Jr. (Rodriguez) on October 7, 1991, and the reply of Kevin Potter (Potter) filed October 21, 1991.

COMPARATIVE CONSIDERATIONS

2. This proceeding was ultimately resolved by the ALJ solely on the standard comparative issue and the criteria enunciated in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The ALJ determined that "Potter receives a slight preference over Rodriguez" on the important diversification of mass media interests criterion. I.D., para. 34. The ALJ also made findings (but did not reach any conclusions) regarding the local residence/civic activities criterion of both applicants, *id.*, at paras. 10, 12, 21, 25, broadcast experience and auxiliary power, *id.*, at paras. 11, 17, 22, 28, and determined that neither applicant was entitled to a preference on the comparative coverage aspect of the standard comparative issue. *Id.*, at para. 29. Neither party has filed exceptions to any of the foregoing findings (and limited conclusions) of the ALJ. Thus, the ALJ's resolution of these matters will not be disturbed. *See* 47 CFR § 1.277(a) ("Any objection not saved by exception . . . is waived").

3. With respect to proposed integration into ownership/management of these individual applicants, the ALJ found that Rodriguez proposes only "to integrate himself into the operation of the station on a part-time basis..." I.D., para. 20. Rodriguez has not excepted to this determination. Potter proposes 100% integration on a full-time basis, and the ALJ concluded that "Potter's full-time proposal is superior to Rodriguez' part-time proposal, and thus, Potter is entitled to a preference on integration . . . ." *See* I.D., paras. 9, 35. As a result, the ALJ concluded that "because the disparity in integration proposals is here so great, there is no need to consider qualitative factors." I.D., para. 35.

4. Rodriguez' sole exceptions (to the comparative aspects of this proceeding) are directed to Potter's alleged failure to demonstrate how he can implement or effectuate his full-time integration pledge at Gainesville because (1) he intends to retain his ownership interest in an extant AM-FM combination in Monmouth, Illinois, and (2) while Potter represents that he will hire a new General Manager for these facilities, he will continue to oversee the operation of the Monmouth stations via telephone and "several visits" each year.[1] This same argument was made before the ALJ, who ultimately concluded (I.D., paras. 36-37; footnotes omitted):

> Rodriguez . . . launches several attacks on Potter's proposal. First, it is claimed that Potter has not shown how he will be able to implement his proposal in view of his other media interests. In this connection, Rodriguez argues that Potter has not demonstrated that adequate provisions have been made for someone other than Potter to manage the Monmouth stations, citing *inter alia*, *Naguabo Broadcasting Company*, 6 FCC Rcd 912 (1991); *Royce International Broadcasting* 5 FCC Rcd 7063 (1990) . . . .
>
> Potter proposes to appoint a general manager for his Monmouth stations and move to Gainesville, Texas, to manage the new station on a full-time basis. Thus, unlike the applicant in *Naguabo Broadcasting Company* . . . Potter will leave Monmouth, Illinois, and move 550 miles away to Gainesville, Texas, where he will manage the new station. Potter will continue to oversee the affairs of the Monmouth station via the telephone and several visits a year. There is no reason to disregard Potter's sworn commitment. Indeed, Rodriguez himself has testified that he only devotes two to three hours a week to one of his stations. If he can do it, why can't Potter? Rodriguez' argument that Potter will not implement his integration proposal is speculative and not based on any facts. It is rejected.

5. In addition to relying on *Naguabo* in its Exceptions, Rodriguez also cites as authority for disallowing Potter's integration proposal recent Board decisions in *Fresno FM Limited Partnership*, 6 FCC Rcd 1570 (Rev. Bd. 1991), and *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163 (Rev. Bd. 1991). In *Naguabo*, a principal there intended to retain two other business interests in the same community as the proposed broadcast facility; in *Pleasure Island*, a principal intended to maintain an automobile dealership, devote at least 15 hours per week overseeing that business interest, plus travelling a "considerable" distance to an-

other community to do so. Further, we note that the Commission has reversed the Board's *Decision* in *Fresno*, awarding the permit at contest to the individual applicant who intends to retain his interest in a substantial local advertising agency. *See Memorandum Opinion and Order*, FCC 91-375, released November 27, 1991.

6. It is pellucid that "[a]pplicants have the burden of proof to establish how they will effectuate their integration proposals." *Cuban - American Limited*, 5 FCC Rcd 3781, 3785 (1990); *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990); *see also Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 (Rev. Bd. 1978). And, as we noted in *Naguabo*, 6 FCC Rcd 924 n. 63, where a broadcast applicant has other " *substantial* " ongoing business interests:

> The Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Tele casters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such promise where significant business interests remain, all comers would receive full-time credit.

7. Here, however, Potter promises to actually move nearly 600 miles from his Monmouth facilities, take up permanent residence in Gainesville, Texas, and visit the Monmouth stations not more than twice a year (Tr. 95-96). There is no evidence in the record before us to suggest that Potter will not physically remove himself a considerable distance from Monmouth, and we agree with the ALJ that there is nothing in the record that requires disregarding Potter's sworn commitment to do so.[2] Thus, we find that Potter has sustained his burden of proof as to how he can effectuate his full-time proposal at Gainesville. And, as the Board has recently held, even where an applicant does have other business interests that will require little additional time and effort, and has demonstrated how those other interests will not conflict with a full-time broadcast proposal, 100% integration credit will be awarded. *See Kennelwood Broadcasting Co., Inc.*, 6 FCC Rcd 1350 (Rev. Bd. 1991), *recon. denied*, 6 FCC Rcd 2894 (100% integration credit awarded where principals will devote no more than three hours per week to overseeing one business interest, and an additional two hours per week to another interest); *Achernar Broadcasting Company*, 5 FCC Rcd 6309 (Rev. Bd. 1990), *reversed on other grounds*, 6 FCC Rcd 5393 (1991) (principal receives 100% full-time integration credit although retaining company that produces weekly newspaper features and devoting 10 hours per week to this organization, as well as an additional two to four hours per week to adjacent-state weekly publications); *Ronald Sorenson*, FCC 91-371, released November 21, 1991 (full integration credit upheld where applicant principal establishes "viable plan" to handle responsibilities for on-going business even though retaining ownership interest, and "unrebutted testimony" establishes that principal "spends negligible amounts of time" to other business activities); *Fresno FM, supra*, FCC 91-375 at paras. 11-13 (full-time integration credit awarded where individual applicant will retain local business interest, but "has provided specific and credible evidence of his respective time commitments and how he will accommodate his outside business interests with his integration proposal"). *See also Bradley, Hand, and Triplett*, 89 FCC 2d 657, 660 (Rev. Bd. 1982). The Board sustains the ALJ's conclusion that Potter can and will effectuate his integration proposal and is entitled to 100% full-time integration credit.

8. Rodriguez next claims that Potter should be denied all integration credit because Potter, on the eve of hearing, withdrew his previously-made divestiture commitment (of his Monmouth stations). This, claims Rodriguez, was "gamesmanship" on the part of Potter. However, we find that the ALJ's disposition of this matter in the I.D. (at para. 38) was entirely appropriate:

> Rodriguez' second argument, that Potter engaged in "gamesmanship," is also lacking in factual support. Clearly, Potter has fully explained his decision to withdraw his divestiture commitment . . . . Because of prevailing economic conditions, Potter believed he would suffer too great a loss if he were forced to sell the Monmouth stations at this time. His explanation is certainly plausible, and Rodriguez has presented no factual support for his speculation that Potter has engaged in "gamesmanship." Indeed, Potter's comparative position in this proceeding was weakened, not enhanced, as a result of the withdrawal of his divestiture commitment. Rodriguez' "gamesmanship" arguments are grounded in speculation. There is no reasonable basis for discrediting Potter's integration proposal.

POTTER's TOWER SITE

9. The *Hearing Designation Order*, 5 FCC Rcd 3488 (1990) (HDO), in this proceeding specified the following issue with respect to Potter's application:

> To determine whether there is a reasonable possibility that the tower height and location proposed by Potter would constitute a hazard to air navigation.

In resolving this issue in favor of Potter, the ALJ noted the following in the I.D. (at para. 18):

> Potter's amendment to his application to slightly relocate his transmitter site and reduce tower height to comply with FAA requirements was accepted by the Presiding Judge by *Order*, FCC 90M- 2032, released July 12, 1990. As a result of this amendment, Potter's proposal no longer constitutes a hazard to air navigation. (Potter Exh. 5; Official Notice taken by *Order* of the Presiding Judge, FCC 91M-2182, released July 16, 1991.)

10. In his Exceptions, Rodriguez argues, in essence, that (1) the ALJ erred in accepting Potter's amendment; (2) Potter was obliged to file his amendment during the "amendment as of right" time period; and (3) Potter should not have delayed the filing of his amendment pending completion of a full FAA aeronautical study.

11. When Potter submitted his Petition for Leave to Amend to the ALJ on June 18, 1990, he included a Declaration of his consulting engineer, E. Harold Munn, Jr. Therein, Munn represented that, on June 30, 1988,

Munn's office filed Form 7460 with the FAA, giving notice that Potter proposed to erect an FM tower near Thackerville, Oklahoma, with a height above ground of 549 feet. Thereafter, on August 25, 1988, the FAA issued an Acknowledgment of Notice of Proposed Construction or Alteration to Potter. The Acknowledgement stated that the proposed construction would exceed Part 77 obstruction standards and that a further aeronautical study had been initiated by the FAA. The Acknowledgement also contained a footnote, stating that "This location, 5,000 feet from Interstate 35, could be a problem for VFR en route aircraft." Then, on August 25, 1988 (the same day the Acknowledgement was issued), Munn received a telephone call from Kenneth Fleischfresser, an FAA official. Fleischfresser advised Munn that the FAA was sending out notices to airports and other aeronautical interests in the area, requesting comments as to whether Potter's proposed tower would constitute a hazard. On September 8, 1988, Munn received a copy of the circularization ("Aeronautical Study of Proposed Construction or Alteration") which indicated that interested persons should file comments on or before October 7, 1988.

12. In his Reply Exceptions, Potter further elucidates (at paras. 23-25):

> In his Petition for Leave to Amend filed with the Administrative Law Judge, Potter pointed out that the "return date" on the FAA circularization, *i.e.*, October 7, 1988, *was the day after the time period expired for filing amendments as of right to the Potter application*. This is an extremely important and key fact . . . .
>
> In its August 25, 1988 communication, the FAA had dropped a footnote indicating that the tower location "could" be a problem for VFR traffic. However, the FAA *did not* say that the tower *would* be a problem; instead, the agency elected to institute a further study. Furthermore, the last day for filing comments in connection with the study was the day *after* the day when Potter had an absolute right to amend his FCC application.
>
> It is obvious that the FAA could neither marshal and assemble all of the comments received or otherwise complete its aeronautical study until a reasonable time had gone by after the date for the receipt of those comments. Mr. Munn knew this. Therefore, although the last day for filing comments was October 7, 1988, Mr. Munn waited until October 14, 1988 (one week later) before contacting the FAA to try to find out the results of the comments and the study (Munn Dec., pg. 2). On October 14, 1988, Mr. Munn called Mr. Fleischfresser once again. In the course of that telephone call, Mr. Fleischfresser told Mr. Munn that he would be issuing a determination of hazard. Following the receipt of that information, Mr. Munn contacted Mr. Potter and recommended that an amendment be filed to reduce tower height and to slightly relocate the tower in order to head-off that determination of hazard. October 21, 1988, Mr. Munn wrote a letter to Mr. Potter, confirming that Potter had authorized the preparation of an amendment. The engineering portion of the amendment was prepared on October 31, 1988 and, at the same time, an amended notice of construction was sent to the FAA . . . . Subsequently, under date of December 22, 1988, Mr. Fleischfresser issued a "Termination of Aeronautical Study of Proposed Construction or Alteration", stating that "at the new location and heights the proposal does not exceed Part 77, Obstruction Standards".

Shortly thereafter (on November 17, 1988) Potter initially petitioned for leave to amend, proposing a new transmitter site and a reduction in proposed tower height to comport with the information received by Munn from the FAA. However, in the HDO, 5 FCC Rcd at 3488, it was held:

> Potter states that the Federal Aviation Administration (FAA) "advised" him that it would not approve his original proposal. Consequently, Potter asserts that good cause exists for acceptance of the amendment. However, our review of the amendment does not disclose any evidence identifying the details of the FAA notification. Specifically, Potter has failed to address the date that he was notified by FAA regarding its determination and the circumstances surrounding FAA's determination. Without such information, the Commission cannot make a good cause determination pursuant to 47 CFR § 73.3522. Accordingly, Potter's November 17, 1988 amendment cannot be accepted and will be returned herein.

13. As noted *supra*, para. 11, Potter resubmitted his proposed amendment to the ALJ on June 18, 1990 (six days subsequent to release of the HDO). In his *Memorandum Opinion and Order*, FCC 90M-2032, *supra*, accepting Potter's amended tower configuration, the ALJ opined:

> The reason the amendment was returned to Potter [upon release of the HDO] was because good cause had not been shown in view of the failure of the petition to supply needed information. Such amendment was not considered on its merits and the filing of the petition by Potter on June 19, 1990 does not seek reconsideration. It merely supplies the necessary information upon which a good cause determination can be made. Thus, Rodriguez's argument is without merit. Also, contrary to the arguments of Rodriguez, Potter has shown good cause for leave to amend. Such amendment has been filed in response to an air hazard issue raised in the designation order. Finally, the Bureau has determined that the amendment complies with the Commission's technical rules. It will be accepted.

Further, we find Rodriguez's claim that Potter should not have awaited the FAA's final determination to file his amendment to be without merit. Pending the running of the full "circularization" of Potter's pending proposal before the FAA there was at least the "reasonable possibility" that the proposal could be acceptable. *See, e. g., Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 732 (1986). In light of all the foregoing, Rodriguez' Exceptions with respect to Potter's tower site are denied.

CONCLUSIONS

14. Potter is fully qualified to be a Commission licensee. He clearly prevails over Rodriguez on a comparative basis, and will thus be awarded the construction permit at contest here.

15. ACCORDINGLY, IT IS ORDERED, That the unopposed Petition for Leave to Amend filed by Kevin Potter on November 6, 1991 IS GRANTED, and the attached amendment IS ACCEPTED; and,

16. IT IS FURTHER ORDERED, That the application of Mark Rodriguez, Jr. (File No. BPH-880707MJ) IS DENIED; and the application of Kevin Potter (File No. BPH-880706MC) for a construction permit for a new Class C2 FM facility at Gainesville, Texas, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Pursuant to the 1965 *Policy Statement*, 1 FCC 2d at 394, diversification of media interests is a "factor of primary significance." Here, Potter comparatively prevails over Rodriguez on this important criterion, and Rodriguez has not excepted to the ALJ's determination. It may be posited that the diversification differences may be sufficient to carry the day for Potter, absent any other comparative considerations. Nevertheless, so that a full and complete record will be developed, the Board will address the integration exceptions of Rodriguez.

[2] Further, as the ALJ properly noted (I.D., at n. 10), recently-revised 47 CFR § 73.1620(g)(i) provides all applicants must now report to the Commission any deviations from comparative proposals.

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL CONCURRING DUBITANTE

With due empathy for my colleagues, who must here again slog the tortured path the Board itself (*mea culpa*) has helped to muddy, I write separately as just I did in *Kennelwood Broadcasting Co., Inc.*, 6 FCC Rcd 1350, 1354 (Rev. Bd. 1991),[1] to illuminate a persistent concern.

As in many recent proceedings, this otherwise close case might turn vitally on the question of whether to credit the ownership/management integration pledge of an applicant who proposes to retain another significant business interest (in this case, two distant broadcast stations he had initially promised to divest), but to diminish his personal oversight of that ongoing business interest.

Because of the dispositive impact of quantitative integration credit in so many of these comparative proceedings,[2] and nearly a decade ago, I urged at length that we be chary of awarding integration credit on the strength of a parol promise to reduce the time spent on an extant enterprise. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 599-604 (Rev. Bd. 1982) (dissenting statement). I there opposed the award of integration credit to a Texas banker who, despite his pledge to reduce his oversight of his vaults and shortly after the station was activated, sold the facility at an enormous profit because (it was reported) the banker "was on 'two career paths', and the broadcast business took more time than he had to devote to it."[3]

In the ensuing years, and perhaps chastened by the *Central Texas* experience, the Board had generally maintained a more rigorous application of the principle first espoused in one of the earliest cases decided under the 1965 *Policy Statement*,[4] *Blancett Broadcasting*. Or, as opined in *Kennelwood* (6 FCC Rcd at 1354; footnote omitted):

> In deciding whether to accept or reject an integration pledge, I invariably revert to the principle first espoused by the Board in *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969), one of the first cases decided after the 1965 *Policy Statement* "codified" integration as a top priority. In denying even slight (25% part-time) integration credit to applicant principals proposing to retain outside business interests, the *Blancett* Board prudently established that " *the very existence* of [these] other interests renders questionable [the] commitments in the absence of an *additional showing* by the applicant of the reliability its integration proposal . . . ." 17 FCC 2d at 230. As to the sufficiency of that " *additional showing*, " and believing as did the *Blancett* Board that in the forests of the Commerce Clause wherein we husband fidelity follows finances, we have consistently rejected as inadequate simple promises to reduce time now spent full-time on an enterprise and to supplant entrepreneural oversight with (hypothetical) employees.

Even as late as this year, we applied a firm hand and stated that:

> [t]he Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985- 86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

Naguabo Broadcasting Co., 6 FCC Rcd 912, 924 n. 63 (Rev. Bd. 1991).[5] *See also, e. g., Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4165 (Rev. Bd. 1991) (integration credit denied where auto dealership, some 100 miles distant, to be retained, despite applicant promises to diminish personal oversight). *But compare Kennelwood Broadcasting, supra.*[6]

Reconciling cases where credit has been ceded with cases where the same credit has been denied, and permitting ourselves the courtesy of a charitable critique, requires the audacious hand and eagle eye of the Hasidic lapidary. *Compare, e. g., Fresno FM Limited Partnership*, FCC 91-375, released November 21, 1991 at paras. 11-13 (100% full-time integration credit allowed to applicant retaining ownership of sizable local advertising agency);

and *Ronald Sorensen*, FCC 91-371, released November 21, 1991 at paras. 7-9 & n. 4 (credit granted to applicant owning, *inter alia*, chain of local video stores)[7] *with*, *e. g.*, *Pleasure Island Broadcasting*, *supra* ; *Ft. Collins Telecasters*, *supra* (credit denied to applicant owning local furniture chain, despite pledge to rely on subordinates); and *Leininger - Geddes*, *supra* (credit denied to attorney, despite sworn pledge to rely on partners and diminish law practice so as to "devote to the station 'whatever time it takes, whether its 40 hours, 60 hours, or 80 hours'"). *But cf. id.*, 2 FCC Rcd at 3200 (credit granted to competing applicant who proposes to retain consulting business with several out-of-state clients).

In the case at bar, the majority yields integration credit to the winning applicant who proposes to retain the two Monmouth, Illinois broadcast stations he currently owns and manages, but who pledges to "appoint a general manager" for the distant stations, oversee their operation by telephone, and visit the stations only periodically. *See ante* para. 4.[8] Not only does the award here appear to confound the *Policy Statement's* premise that the high incentive for integration credit also promotes media diversity, our comparative criterion of "primary significance," 1 FCC 2d at 394, because ownership concentrations "are necessarily achieved at the expense of integrated ownership," *id.*, at 394, the award seems to follow no pattern of precedent. Thus, for instance, the fact that the retained broadcast business is distant from the subject community is frequently held against an applicant. *E.g.*, *Pleasure Island*, *supra* ; *see generally also Julia S. Zozaya*, 5 FCC Rcd 6607 (1991)(integration denied where applicant proposes to retain another Arizona station, but to diminish oversight of that station). Nor can it be, as it appears to have in *Fresno FM*, *supra*, and *Ronald Sorensen*, *supra*, that the applicant identified the particular employee(s) expected to pick up the slack, since -- so far as the record shows -- the winning applicant here has not yet appointed a general manager for his two other stations.[9] This all seems *ex visceribus*.

It is time for the Board to heed the Bard and admit: "The naked truth of it is, I have no shirt."[10] I humbly suggest, again, that we revert to the steelier logic of *Blancett* and recognize that " *the very existence* " of another substantial business interest renders exceedingly dubious a mere promise to devote "full-time"[11] to a new broadcast facility. I would require an applicant to either forego altogether a significant business interest, *see*, *e.g.*, *Renee Marie Kramer*, 5 FCC Rcd 563 (Rev. Bd. 1990) (integration credit granted where attorney pledges to completely terminate practice), or to demonstrate that he/she has been essentially a passive owner in that enterprise. *See*, *e. g.*, *Naguabo Broadcasting*, *supra*, 6 FCC Rcd at 912, where the winning applicant did show just that. Short of such circumstances, it is folly to attempt to predict whether an applicant will substantially ignore an ongoing enterprise in which he/she has been immersed, and devote "full-time" (*see supra* note 11) to a fledgling broadcast facility.

But for the fact that I believe the winning applicant would prevail on media diversification grounds, and in the face of *Fresno FM* and *Ronald Sorensen*, I would dissent. As it is, I offer instead this statement.

Footnotes to Statement

[1] *See also Kennelwood Broadcasting Co., Inc.*, 6 FCC 2d 2894, 2896 (Rev. Bd. 1991) *(on reconsideration)* (separate statement).

[2] For better or worse, it is now "black letter law" that "a 'clear' *quantitative* difference of 12.5 percent [in integration credit] cannot be overcome by the *qualitative* attributes of competing owners." *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-66 (1991) (citing *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1983)).

(In practical effect, that means that one applicant, possessing *all* of the *qualitative* attributes sought under the 1965 *Policy Statement*, *infra* note 4 (*e. g.*, life-time local residence, extensive civic activities, distinguished broadcast experience, *and a minority preference)*, but holding only an 85% equity interest, cannot prevail over a competitor with not a trace element of those attributes, if the competitor owns 100% of the equity. As a loyal subaltern, I naturally do not question the rationality of this policy formulation; I make the point to underscore the critical impact of *quantitative* integration credit.)

[3] *Central Texas Broadcasting Co., Limited*, ASSIGNOR, 64 RR 2d 332, 333 (Video Services Div. 1987).

[4] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965)(full-time integration of ownership into active station is, next to media diversification, our most important criterion).

[5] In affirming that aspect of *Naguabo Broadcasting*, the Commission agreed that, where a significant business interest is to be retained, an applicant seeking full-time integration credit must make a very strong and detailed showing. "Such a showing is necessary because the 'very existence' of outside business interests renders an applicant's commitment questionable." 6 FCC Rcd 4879, 4880 (1990)(citing *Blancett Broadcasting*, *supra)*.

[6] In *Kennelwood*, I did not dissent, but concurred with much dubiety, because the record was not clear that the business to be retained was "significant." *See* 6 FCC Rcd at 1354.

[7] In that *Sorensen* footnote, the Commission distinguished *Naguabo Broadcasting* this way:

> In *Naguabo Broadcasting Company*, 6 FCC Rcd 912 (Rev. Bd. 1991), we rejected an integration proposal where the applicant proposed to hire additional employees to enable him to reduce involvement with his outside businesses, but did not provide a specific and credible plan for accommodating these outside interests with his plan for full-time integration. In that case, the applicant intended to retain his ownership of two profitable businesses, a gas station and sound equipment company. The sound equipment business was a one-man operation in which the applicant lined up jobs and hired independent contractors to perform them. The applicant testified that he lived behind the gas station and that he might locate the radio station there. We rejected the applicant's full-time integration proposal because he failed to provide a detailed accounting of his duties and time to show specifically how each business would operate independently in the future. In sum, we found the need for a detailed accounting compelling because the situation readily lent itself to the applicant's continuing involvement in the affairs of his two existing businesses to the detriment of his full-time integration proposal. Here, only one business is involved and, in contrast to the sound equipment business in *Naguabo*, it is operating with a number of experienced employees. More significantly, Eychaner has identified who will take over his management responsibilities for

> the video stores and has detailed a credible plan as to how delegation to those individuals will permit him to terminate his involvement in the operation of those stores.

[8] Our applicant withdrew a prior pledge to divest the two Illinois stations, because he "believed he would suffer too great a loss if he were forced to sell the . . . stations at this time." *Ante*, para. 8 (quoting I.D.). But does this create an inference that the applicant will show *less* concern for his two suffering stations? Or *more*?

[9] In *Blancett Broadcasting*, supra, the Board held that it would not grant even partial (25%) integration credit without a strong "additional showing" of the ability to effectuate a full-time integration. However, in reviewing the recent precedent it appears, reductively, that the strong "additional showing" imperative of *Blancett* has been satisfied by providing a particular subordinate's *name*. But what does this really add; subordinates come and go, but concern with a substantial investment seems to linger.

[10] *Love's Labor Lost* V, ii, 715. From time to time, the Commission notices the disparate treatment of integration proposals, and at least strives for consistency. *Cuban-American Limited*, 5 FCC Rcd 3781, 3784-85 (1990) (competing integration proposals both rejected).

[11] In some degree, the loose application of full-time integration credit traces to the gloss the Board, over the years, has placed on the *Policy Statement's* deployment of the term "full-time." In researching the derivation of the Board's notion that "full-time" integration requires a commitment of no more than "40 hours per week," instead of defining that term more sensibly to mean "to the exclusion of all other significant business interests," I have discovered only as follows: reacting to the Commission's refusal to grant full-time credit to an applicant proposing 30-35 hours per week in *L. B. Wilson, Inc.*, 37 FCC 511, 520 (1964), the Board in *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979), "reasoned" that 20 hours per week constituted "part-time" integration because:

> Twenty hours a week is an appropriate cut-off point for this purpose, since that quantity of time represents approximately one- half of a full-time work week.

See generally also Flint Family Radio, 69 FCC 2d 38, 41 & n. 5 (Rev. Bd. 1977). By the time the Board reached the (aptly captioned) *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 491 (Rev. Bd. 1984), it was able to state (on its own impeccable authority):

> Long-standing Commission practice makes clear that a "full-time" proposal is one that entails a minimum of 40 hours per week. *See, e.g., Angeles Broadcasting Network*, FCC 84R-2, released January 16, 1984, para. 21 (Rev. Bd.); *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 n. 33, 46 RR 2d 1467, 1481 n. 33 (Rev. Bd. 1980); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 n. 5, 41 RR 2d 1155, 1159 n. 5 (Rev. Bd. 1977).

From such obscure genes is conceived "black letter" comparative doctrine (*see also supra* note 2).

By devaluing the *Policy Statement's* important credit for "full-time" ownership/management integration into the bureaucrat's (and AFL-CIO's) standard of a "40 hour work week," the Board has transmogrified "full-time" into "*part-time*," which allows such nonsense as we have seen in *Julia S. Zozaya, supra*, where an applicant can earnestly propose full-time integration (40 hrs.) at one Arizona station and "substantial time" (30 hrs.) at a distant station, because the Board (in another *ex cathedra* decree) found that "it is simply unreasonable to expect [an applicant] . . . to work in excess of 70 hours per week." *Flint Family Radio*, 69 FCC 2d at 41. In my view, the only meaningful interpretation of "full-time" attention by a nascent station owner would be "to the exclusion of all other significant business interests," an interpretation I think implicit in the *Policy Statement* and applied realistically in the 1968 *Blancett Broadcasting*. *Cf.* Communications Act of 1934, as amended, 47 U.S.C. § 154(b)(4) (FCC Commissioners "shall not engage in any other business, vocation or employment while serving").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allnet Communications Services, Inc.
Complainant,

v. File No. E-88-30

Michigan Bell Telephone Company
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1991; Released: December 13, 1991

By the Commission:

I. INTRODUCTION

1. Allnet Communications Services, Inc. ("Allnet") has filed a formal complaint against Michigan Bell Telephone Company ("Michigan Bell") alleging that Michigan Bell violated the Communications Act by refusing to deliver to Allnet intraLATA toll traffic over Wide Area Telecommunications Service (WATS) access lines, pursuant to Ameritech Tariff F.C.C. No. 2. [1] Allnet claims that Michigan Bell's refusal to lift restrictions on the use of interstate WATS access lines for the provision of intraLATA service by Allnet unjustly denies Allnet the use of special access facilities in violation of Section 201(b) of the Act [2] and constituted unreasonable discrimination in violation of Section 202(a) of the Act. [3] Allnet seeks an order by the Commission: (1) declaring Michigan Bell's tariff restrictions on the use of WATS access lines by Allnet for the carriage of intraLATA traffic in Michigan between January 1 and December 31, 1988 to be unlawful and (2) awarding Allnet $1,825,000.00 in damages allegedly suffered by Allnet as a result of Michigan Bell's unlawful routing practices. [4] For the reasons set forth below, we dismiss Allnet's complaint without prejudice.

2. Before turning to the specific contentions of the parties, a brief overview of the Commission's access tariff proceedings and pertinent Commission decisions is helpful.

II. BACKGROUND

3. Prior to 1986, many interexchange carriers (IXCs) offered a variety of switched services which their customers used to originate traffic on dedicated, rather than switched, access lines. These dedicated lines were known generically as "WATS access lines", although as a practical matter, they could be used to provide a variety of telecommunications services. Until 1986, the WATS access lines of AT&T were classified as switched access lines by the Commission, while the WATS access lines of the other common carriers (OCCs) were classified as special access lines. [5] In 1986, the Commission reclassified the dedicated portion of all WATS access lines, whether previously switched or special access, as special access. [6] As a result of the tariff reclassification, it became economical for many resellers, such as Allnet, to utilize in specific circumstances an access configuration comprised of a special access line from the reseller's customer's premises to the local exchange carrier (LEC) central office, LEC central office switching, and a (switched access line to the OCC's point of presence, in providing a number of services. [7] During this post-divestiture period, however, many LECs sought to continue to impose certain restrictions on the use of WATS access lines similar to those which AT&T had imposed during the pre-divestiture period. In a series of decisions on the 1986 Access Tariff Filings, the Commission concluded that LEC restrictions on the use of WATS access lines made them of little value to OCCs in the design, configuration, and provision of new interstate service offerings to the extent such offerings differed in any significant way from AT&T's traditional WATS offerings. [8] Specifically, in its *May 20 Order*, the Common Carrier Bureau (Bureau) found a number of tariff revisions proposed by several local exchange carriers that involved mandatory direct and indirect restrictions on the use of WATS access lines, including screening, blocking and directionality requirements, to be unjust and unreasonable under the Communications Act. [9] The Bureau ordered that all such restrictions be removed insofar as they were applied to some and not all types of special access lines. [10]

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[1] An answer denying the alleged violations and raising affirmative defenses, and a motion to dismiss were filed by Michigan Bell. Allnet filed a reply to Michigan Bell's answer and affirmative defenses and an opposition to Michigan Bell's motion to dismiss. Subsequently, briefs and reply briefs and additional pleadings addressing specific legal issues were filed at the request of the Bureau.

[2] 47 U.S.C. § 201(b).

[3] 47 U.S.C. § 202(a).

[4] Allnet also requests that it be awarded attorney's fees.

[5] Prior to the Commission's reclassification of the dedicated portion of WATS access lines, AT&T historically required separate WATS lines for interstate and intrastate WATS traffic. Some OCCs, in contrast, did not require separate access lines for interstate and intrastate traffic. Consequently, where necessitated by state regulation, they performed their own screening and blocking of intrastate calls originating on mixed-use WATS access lines at their own switch. In cases where state regulations permitted OCCs to complete intraLATA calls originating on mixed-use access lines, they did so.

[6] *See* WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115 (released March 21, 1986).

[7] *Id.*

[8] *Midyear 1986 Access Tariff Filings*, Nimeo No. 4621, (Com. Car. Bur. released May 20, 1986) (*May 20 Order*), *recon. denied*, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[9] *See, May 20 Order* at 8.

[10] *Id.*

4. In its *December 19 Order*, the Commission denied petitions for reconsideration of the *May 20 Order* filed by a number of LECs and ordered the LECs to file revised tariffs removing all unlawful mandatory restrictions on the use of WATS access lines. [11] In addressing the issue of the Commission's preemption of state-mandated restrictions on the use of WATS access lines, the Commission stated:

> We do not, however, foreclose the possibility that restrictions *might be imposed* to implement state commission policies, for example, if a state prohibits the provision of some or all intrastate services by a particular carrier, *a LEC could reasonably block such traffic* even if the carrier had not requested such blocking service. The *May 20 Order* also would not prevent a state from requiring that intrastate WATS service only be provided over jurisdictionally dedicated access lines. We would, of course, expect that the restrictions would be clearly stated in the LEC's interstate tariffs and adequately justified in materials that are filed to support the tariff. [12]

5. In response to the *December 19 Order*, BellSouth Services, Inc. ("BellSouth") proposed revisions to its Tariff F.C.C. No. 1 which required the blocking of all intrastate calls originated over WATS access lines carrying Feature Group C (FGC) and Feature Group D (FGD) traffic.[13] In support of the proposed revisions, BellSouth asserted that the policies of state commissions within its service territory required that it include the restrictions in its interstate tariff. In addressing the contentions of BellSouth and various petitions filed against the proposed revisions, the Commission emphasized that the *May 20 Order* "... did not and does not purport to preempt any state restrictions contained in intrastate tariffs or any state laws or restrictions limiting the scope of outside competition." [14] The Commission, however, reviewed the materials submitted by BellSouth to justify the proposed tariff restrictions and found that BellSouth had failed to provide any "definitive articulation by the state of a policy limiting the scope of intrastate competition" [15] since it had cited no official action taken by the state legislature, the local regulatory commission or a state court. [16]

6. With that background in mind, we now turn to facts relevant to the instant complaint. In 1987, the Michigan Public Service Commission ("MPSC") issued an order in its Case No. U-8716 which sanctioned a one-year transition to full intraLATA competition between state-regulated interexchange carriers and local exchange carriers. [17] In particular, as part of its transition plan to full intraLATA competition, which was to occur between January 1 and December 31, 1988, the MPSC ordered the LECs and IXCs under its jurisdiction to maintain what it termed the existing exclusive routing of Dial 1+ and Dial 0+ intraLATA traffic to the LECs for completion in order to ensure adequate protection for the LECs during the one-year transition period. [18] However, the MPSC authorized the IXCs to compete for, and complete, intraLATA traffic which was dialed using carrier-specific "10XXX" access codes. As a practical matter, compliance with the MPSC's exclusive routing directive for 1+ and 0+ intraLATA calls required either the LEC supplying the access lines, or the customer to which such access lines were supplied, to perform the necessary screening and blocking required for exclusive IXC completion of calls originating on multi- jurisdictional WATS access lines. In purported compliance with the *MPSC's Order*, Michigan Bell included in its (i.e., Ameritech's) tariff screening and blocking requirements as a pre-condition to its provision of multi-jurisdictional WATS access lines to a customer.

7. When Allnet subsequently ordered interstate WATS access lines from Michigan Bell, Michigan Bell informed Allnet that the WATS access lines ordered would only be furnished under the restrictive conditions allegedly required by the *MPSC Order*. Specifically, where an Allnet WATS customer attempted to dial a 0+ or 1+ intraLATA call on the WATS access line, that call would either have to be screened and blocked, or delivered to Michigan Bell for completion. Alternatively, if Allnet wished to complete that call, Allnet could do so only if it had agreed, prior to receiving the access lines, that it would turn over all revenue derived from such calls to Michigan Bell. In support of these pre-conditions, Michigan Bell cited its (i.e. Ameritech's) interstate tariff, [19] which it claimed derived from the Dial 1+ and Dial 0+ requirements in the *MPSC Order*.

III. CONTENTIONS OF THE PARTIES

8. Allent contends that Michigan Bell is precluded by the Commission's 1986 Access Tariff decisions from restricting its customer/IXCs from completing intraLATA toll calls over special access lines. Therefore, Allnet alleges, Michigan Bell refusal to deliver to Allnet intraLATA toll traffic over WATS access lines provided pursuant to Ameritech Tariff F.C.C. No. 2 is unreasonable under Section 201(b) of the Act and unjustly discriminatory under Section 202(a) of the Act.

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[11] *See December 19 Order* at paras. 20, 28.

[12] *December 19 Order* at para. 19 (footnote omitted).

[13] *See BellSouth Services Tariff F.C.C. No. 1*, Transmittal Nos. 49 and 54, (released February 17, 1987) (*BellSouth Services*).

[14] *BellSouth Services* at 8-9.

[15] *Id.* at 9.

[16] *Id.* at 9-10.

[17] Inquiry into the Status of Competition in the Provision of Telecommunications Services, Case No. U-8716 (Mich. P.S.C., Oct. 27, 1987), Memorandum Opinion and Order (hereafter "*MPSC Order*").

[18] *MPSC Order* at 11. At that time, there were seven interexchange carriers holding certificates of public convenience and necessity allowing them to provide intrastate, interLATA services in Michigan. Allnet was not among these certificated carriers, which included AT&T, US Sprint, MCI, the Western Union Telegraph Co., Litel Telecommunications Corp., United States Transmission Services, Inc., and Mutual Signal Corp. *See, id.* at 13, n. 7. We note that the record indicates that while 0+ and 1+ intraLATA traffic in the state of Michigan during the period in question was usually exclusively routed to, and completed by, the LECs, there were apparently some exceptions where interexchange resellers were completing so-called 'incidental' intraLATA traffic. These exceptions were acknowledged by the MPSC in its order without discussion or elaboration. *See id.* at 12-14.

[19] *See*, Motion to Dismiss at 15.

9. In response, Michigan Bell argues that Allnet has failed to allege a valid cause of action under 201(b) or 202(a) because its complaint concerns only intrastate intraLATA communications. Michigan Bell contends that Allnet's complaint raises state issues which must be addressed at the state level. According to Michigan Bell, Allnet, through its participation in proceedings before the MPSC, has conceded that the MPSC is the appropriate body to decide the issue. Michigan Bell maintains that, in any event, its tariff restrictions on the intraLATA use of interstate WATS access lines are in accordance with the Commission's Access Tariff decisions.

10. Allnet counters that its complaint concerns the legality of restrictions placed by Michigan Bell on the use of interstate special access lines, an issue it contends must be resolved by the Commission. Allnet further states that the *MPSC Order* does not and could not restrict the kind of intrastate and interstate services Allnet can provide because Michigan law exempts resellers from all regulationby the MPSC. [20] Finally, Allnet argues that its participation in proceedings before the MPSC cannot be construed as a concession that the MPSC has the jurisdiction over the legality of restrictions on the use of interstate special access lines provided pursuant to federal tariffs.

IV. DISCUSSION

11. As set forth in the Bureau's *May 20 Order,* the Commission will not preempt a clearly expressed state policy restricting intraLATA competition which requires a LEC to include provisions in its interstate tariff that place restrictions on the use of multi-jurisdictional WATS access lines. As the Commission clarified in the *December 19 Order,* the state policy restricting intraLATA competition must be reflected in an action, such as a court decision, administrative agency ruling, or the like, which is presented in and adequately supported by the materials filed with the tariff. [21]

12. The instant case differs fundamentally from that presented in *BellSouth Services.* Here, there is no doubt that, for the one-year transition period in question, the MPSC had articulated a policy banning competition in the provision of intraLATA Dial 1+ and Dial 0+ service.[22] This was apparently done as a transitional measure, limited in time, to protect LEC revenues during the changeover to full intraLATA competition. [23] The issue here is not the existence of a ban, but the question of whether the MPSC's ban extended to resellers. Allnet contends, in effect, that the ban imposed by the MPSC's does not apply to resellers because Michigan law exempts resellers from any regulation by the MPSC. Allnet contends, therefore, that there are no statutory or regulatory requirements which prohibit it from offering both intraLATA and interLATA services.

13. Our reading of the relevant provisions of P.A. 305 and the *MPSC Order* revealed that there is some ambiguity as to whether the restrictions on intraLATA were intended to apply to all interexchange carriers or in all circumstances. The MPSC appears to have mandated exclusive LEC routing of all Dial 1+ and Dial 0+ traffic while noting elsewhere in its order, without further discussion or analysis, that: (1) such traffic was already being completed on an incidental basis by some IXCs, and (2) that some resellers, including Allnet, had taken the position that Michigan's P.A. 305 prevented the MPSC from regulating or restricting their intraLATA service offerings.[24] Under these circumstances, it can be argued that the ban, which sought to preserve the status quo in Michigan as of October 1987, was intended to apply only to facilities-based interexchange carriers over which the MPSC had acknowledged statutory jurisdiction, and not to resellers.

14. On the other hand, we find it significant that the *MPSC Order* speaks in clear and unambiguous terms of exclusive LEC routing of all Dial 1+ and 0+ traffic during the transitional period. [25] Apart from the suggestion that the MPSC's action was taken with the knowledge that it lacked the requisite authority to restrict the service offerings of resellers in the state, there is no language in the *MPSC Order* which would indicate that the MPSC intended or contemplated that resellers would be exempted from the ban on the completition of Dial 1+ and Dial 0+ intraLATA toll traffic during the transitional period. Given the express language of the *MPSC Order,* it can also be argued, as does Michigan Bell, that the tariff restrictions at issue were a reasonable and proper consequence of a state policy restricting intraLATA competition.

V. CONCLUSION AND ORDERING CLAUSE

15. We have carefully examined the record developed in this proceeding on the record before us, including the briefs and reply briefs of the party. Normally, the expression of a state policy, as set forth in the *MPSC Order* mandating restrictions on interexchange carrier competition of intraLATA Dial 1+ and Dial 0+ traffic would be sufficient basis for a determination that the removal of such restrictions from Michigan Bell's interstate tariff was not required under our *May 20 Order.* Given the express language of Michigan's P.A. 305 exempting resellers from regulation by the MPSC, however, what is unclear about the *MPSC Order,* and what we are unable to resolve in this proceeding on the record before us, is whether Michigan's ban on intraLATA competition in fact extended to resellers such as Allnet during the period in question. It is

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[20] *See* Allnet's Opposition to Motion to Dismissat 5 citing, Mich. Comp. Laws § 404, 103d (Public Act 305) (1986) (hereinafter "P. A. 305"). The language exempting Michigan resellers from MPSC regulation states:

> Telecommunications service providers that do not own telephone lines or exchanges doing telephone business in Michigan and provide a service to the public exclusively through the resale of services purchased from other service providers operating, owning, or controlling telephone lines or exchanges doing telephone business in Michigan shall not be regulated by the Commission.

[21] *December 19 Order* at para 19.

[22] *See MPSC Order* at 4-5.

[23] *Id.* at 5.

[24] *Id.* at 4-7.

[25] *Id.* at 7.

not the role of this Commission to interpret or resolve ambiguous or conflicting state requirements or policies. Such matters are, as they should be, within the purview of the state. We will therefore dismiss Allnet's complaint without prejudice pending a final determination at the state level of the scope or effect of the *MPSC Order* with respect to resellers in the state. [26] Allnet may refile its complaint following such state determination should it elect to do so. For purposes of the statute of limitations contained in Section 415 of the Act, [27] Allnet's complaint will be deemed to relate back to the filing date of its original complaint provided that the complaint is filed within ninety (90) days after public notice of a final decision in the appropriate state forum action clarifying the scope of the *MPSC Order* with respect to resellers.

16. Accordingly, IT IS ORDERED that the above-captioned complaint, filed by Allnet Communications Services, Inc., IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[26] We would expect Allnet to bring this matter before the appropriate state forum promptly if it wishes to pursue its claims.

[27] 47 U.S.C. § 415. Subsection (b) provides in pertinent part that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, et al.,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.	File No. E-89-385
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390
GTE NORTH, INC.,	File No. E-89-391
GTE SOUTH, INC.,	File No. E-89-392
GTE SOUTHWEST, INC.,	File No. E-89-393
CENTRAL TELEPHONE COMPANY and	File No. E-89-395
THE CONTINENTAL TELEPHONE COMPANIES, Defendants.	File No. E-89-396

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 639 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET
COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-343
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-344
WISCONSIN BELL, INC.,	File No. E-89-345
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-346
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-347
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-348
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-349

Defendants.

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 645 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC., Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-397
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-398
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-399
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-400
THE BELL ATLANTIC TELEPHONE COMPANIES,	File No. E-90-444
BELLSOUTH CORPORATION,	File No. E-90-445
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-446
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-447
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-448
OHIO BELL TELEPHONE COMPANY,	File No. E-90-449
WISCONSIN BELL, INC.,	File No. E-90-450
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-451
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-452
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-453
PACIFIC BELL TELEPHONE COMPANY and	File No. E-90-454
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	File No. E-90-455

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 641 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

In the Matter of

ACCESS LONG DISTANCE CORPORATION,
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, File No. E-89-422

NEW YORK TELEPHONE COMPANY, and File No. E-90-315

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY File No. E-90-316
Defendants.

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 649 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P., Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	E-89-414
WISCONSIN BELL, INC.,	E-89-415
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-416
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-89-417
GTE NORTH, INC.,	E-89-418
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-270
INDIANA BELL TELEPHONE COMPANY,	E-90-271
MICHIGAN BELL TELEPHONE COMPANY,	E-90-272
OHIO BELL TELEPHONE COMPANY,	E-90-273
NEW YORK TELEPHONE COMPANY,	E-90-274
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-275
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-276
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-277
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-90-278
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-279
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-280
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-281
CINCINNATI BELL TELEPHONE COMPANY,	E-90-282
GTE NORTH, INC. and	E-90-284
UNITED TELEPHONE COMPANY OF OHIO, Defendants.	E-90-286

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 643 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision)*. In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-424
GTE NORTH, INC.,	File No. E-89-425
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-258
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-259
OHIO BELL TELEPHONE COMPANY,	File No. E-90-260
NEW YORK TELEPHONE COMPANY,	File No. E-90-262
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-263
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-264
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-265
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-266
CINCINNATI BELL TELEPHONE COMPANY and	File No. E-90-268
GTE NORTH, INC., Defendants.	File No. E-90-269

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 650 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY and — File No. E-89-420

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Defendants. — File No. E-89-421

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order,* 6 FCC Rcd 648 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand,* CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision).* In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

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[1] *Illinois Bell Tel. Co. v. FCC,* 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY, L.P., Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-89-368
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-89-369
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-370
THE DIAMOND STATE TELEPHONE COMPANY,	E-89-371
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-89-372
NEW JERSEY BELL TELEPHONE COMPANY,	E-89-373
PACIFIC BELL TELEPHONE COMPANY,	E-89-378
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	E-89-380
NEW YORK TELEPHONE COMPANY,	E-90-122
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-123
CINCINNATI BELL TELEPHONE COMPANY,	E-90-125
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, and	E-90-126
NEVADA BELL TELEPHONE COMPANY	E-90-156

Defendants.

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit. [1] *Order*, 6 FCC Rcd 640 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date. [2]

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-401
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-402
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 9, 1991; Released: December 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 642 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision*, there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

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[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-481

Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations — RM-6910

REPORT AND ORDER

Adopted: October 24, 1991; Released: November 21, 1991

By the Commission:

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INTRODUCTION

1. This *Report and Order* clarifies and modifies our rules and policies with regard to station construction, station operation, the discontinuance of station operations, license renewal and license reinstatement in the private land mobile radio services. We also implement a "finder's preference" program to give a dispositive licensing preference to persons who provide us with information about licensees that are not in compliance with our construction and operational rules.

BACKGROUND

2. The private land mobile radio services operate on five principal frequency bands. [1] As demand for private land mobile frequencies has increased, many areas of the country are facing situations where channels licensed on an exclusive basis are becoming unavailable and channels licensed on a shared basis have become very congested. [2] Under our rules, licenses are issued for an initial five-year term and may then be renewed for additional five-year\terms. [3] A license may, however, terminate at almost any time during the license term if the licensee fails to satisfy certain requirements, or it may expire if the licensee neglects to renew the license. For example, a new private land mobile licensee must construct a radio facility, place the facility in operation, and remain in operation in order to maintain its license.

3. On October 11, 1990, we adopted a *Notice of Proposed Rule Making* to clarify and modify certain rules relating to the operation of private land mobile radio

[1] These bands are the 25-50 MHz and 150-174 MHz VHF bands, the 450-470 MHz UHF band, the 470-512 MHz band (shared with UHF-TV), and the 800/900 MHz bands.

[2] Channel exclusivity precludes the licensing of additional users on a particular licensee's channel within the licensee's area of operation.

[3] *See generally* 47 C.F.R. § 90.149.

stations and to consider implementation of a new licensing concept called "finder's preference." [4] We proposed to clarify the requirement that stations be both constructed and placed in operation within prescribed time periods. Additionally, we proposed to clarify our long-standing rule interpretation that a licensee that has discontinued operations for one year or more is deemed to have permanently discontinued such operations, and that, as a consequence, license cancellation occurs automatically. The *Notice* also addressed changes in our policies and methods regarding reinstatement of expired licenses. Finally, the *Notice* proposed to establish a "finder's preference" program to enhance our management of certain private land mobile frequency bands. This program would offer an incentive to the public to assist us in our channel recovery efforts. Thus, an individual who offers us assistance in the recovery of channels by providing information about a licensee that has violated our rules would be awarded a dispositive "preference" to become licensed on the recovered channels. In response to the *Notice,* we received 24 comments and 10 reply comments. [5]

DISCUSSION

I. Station Construction and Operation

4. *Proposal.* Licensees in the private land mobile radio services must construct their stations and place them in operation within prescribed time periods. [6] Both conventional non-SMR and SMR systems must generally be "placed in operation" within eight months from the date of license grant and trunked stations must be constructed and placed in operation within one year of license grant. [7] We recognized that there has been some confusion in the industry regarding the relationship between the "construction" and "placed-in-operation" requirements. *Notice,* 5 FCC Rcd at 6401.

5. In the *Notice,* we indicated that constructing and placing a station in operation are separate and independent licensing conditions. [8] 5 FCC Rcd at 6401. This interpretation is consistent with our 1985 decision in an SMR licensing case where we found that a trunked SMR license cancelled automatically for failure to construct one year after license grant. [9] We further indicated at that time that the licensee had failed to place its system in operation -- an omission that also would serve as a basis for license cancellation. "[10] In the *Notice* we stated that a base station would not be considered operational unless "associated mobile stations" are also operational. 5 FCC Rcd at 6407-8, App. A.

6. *Comments.* Several commenters support our clarification of the construction and placed-in-operation rules as separate and independent conditions of licensing. 2 [11] Some commenters say the proposed clarification (consistent with our enforcement policy. [12] These commenters explain that the generally accepted industry standard for SMR construction has been that SMR systems be "capable of providing service if service was requested." [13] Other commenters contend that any placed-in-operation requirement should only be enforced prospectively. [14]

7. Several commenters argue that, to reduce the warehousing and hoarding of frequencies, all requested mobiles should be placed in operation no later than the last day of the appropriate construction/operation time period. [15] Believing that valid applicants will have no difficulty installing a minimum number of mobiles, some commenters assert that a certain percentage of mobiles should be operational at the end of the construction period. [16] Many commenters interpret the *Notice* to require that licensees place at least one associated mobile in

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[4] Notice of Proposed Rule Making, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990), Order, 5 FCC Rcd 7426 (1990) (extending comment period), Order, 6 FCC Rcd 446 (1991) (extending reply comment period) (*Notice*) .

[5] *See* Appendix A. In the *Notice,* we also requested additional comments on ways for improving our various compliance programs. *Notice,* 5 FCC Rcd at 6404. We did receive suggestions for improvements in our procedures that would in all likelihood require rule changes rather than adjustments in policy. We decline to act on these in this proceeding. For example, *see* Comments of AMS at 6-10, CICS at 24-25, and SIRSA a: 22-23. We will, however consider these suggestions, as well as any formal petitions for rule making that better document the issues raised, as part of possible future proceedings.

[6] Note that the newly authorized services in the 220-222 MHz band have distinct construction and operation requirements under Subpart T. Report and Order, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991), *pending recon.*

[7] For conventional systems, *See* 47 C.F.R. §§ 90.155, 90.633(c). For trunked systems, *See* 47 C.F.R. § 90.631(e) and (f). We permit certain licensees an extended implementation schedule if they meet the requirements and conditions set forth in 47 C.F.R. § 90.629.

[8] *See* 47 C.F.R. §§ 90.155(a), 90.631(f), 90.633(d). The license cancels automatically at the end of the designated time period, regardless of whether the cancelled license is returned to the Commission.

[9] Memorandum Opinion and Order, FCC 85-68 (released Feb. 19, 1985) (*System 800*) .

[10] *Id.* The separate requirements of construction and placed-in-operation are also referred to in another rule. That is, when a licensee of a constructed General Category system authorized to operate in a conventional manner plans to combine with an existing trunked system above 800 MHz, the licensee's application must state the date of both construction and operation -- with operation defined as the point at which mobiles/portables begin to interact with the mobile relays. 47 C.F.R. § 90.609(d)(5).

[11] Comments of APCO at 6-7; Celpage at 4; CICS at 3; Discom at 2; Fleet Call at 3; NABER at 14; City of Pasadena at 3; SIRSA at 11; UTC at 3-4. We did not receive any comments suggesting the complete elimination of either the construction or the placed-in-operation requirements.

[12] *See* Comments of AMS at 4; Motorola at 3; NABER at 14-15. We have generally limited the scope of our one-year review of trunked SMR systems to whether a license has constructed its facilities.

[13] Comments of AMS at 4;SIRSA at 11.

[14] Comments of Discom at 3; Fleet Call at 4; NABER at 15.

[15] Comments of Celpage at 4; MRFAC at 3-4. Our rules require applicants to specify the number of mobiles to be placed in operation. 47 C.F.R. § 90.607. MRFAC argues that rather than defining "operational" in terms of one base-mobile pair, applicants should be required to place in operation the number of mobiles applied-for within eight months. Being permitted to activate only one mobile and the associated base station, they claim, could induce applicants to inflate the number of mobiles they apply for. Comments of MRFAC at 3-4.

[16] Reply comments of API at 4;comments of Palidor at 5-6. Palidor suggests 30% of the number of mobiles stated on the application be installed and in operation within the prescribed construction period.

operation by the end of the construction period.[17] Requiring only one mobile did generate some criticism because it would in effect impose a one-mobile loading requirement on SMR systems at a time when the Commission is phasing out loading requirements.[18] A question also arose as to whether the one-mobile placed-in-operation requirement can be met if that one mobile is operated by the station licensee itself.[19]

8. *Decision.* We will continue to apply our existing rules relating to both the construction and placed-in-operation requirements and will now enforce these rules as articulated in paragraphs 9 and 10, below. The two rules are integral to assuring that licensees actually use the valuable spectrum that they are assigned. We will begin enforcement of both rules (as per paragraphs 9 and 10) for licensees with eight-month or one-year construction/placed-in-operation deadlines [20] falling on or after the effective date of this proceeding. [21]

9. We will require that a licensee construct a base station that is operational on *all* of the channels assigned. Construction of the base station must be in substantial accordance with the parameters specified in the station authorization (e.g., authorized antenna height). All channels not so "constructed" will be recovered from the licensee.

10. We additionally will amend our rules to clarify certain aspects of our existing placed-in-operation requirements for both conventional and trunked systems. First, licensees of both conventional and trunked stations may rely upon their own mobiles to satisfy the placed-in-operation requirement. "Placed-in-operation" will require "transmission and reception of radio signals between a base station and mobile station." [22] Therefore, licensees of conventional systems must have at least one mobile and one base station placed in operation by the required deadline. The *System 800* decision indicates, however, that a trunked system cannot be considered placed-in-operation until the system switches a blocked channel's transmission to another clear channel. We thus will require trunked systems to have at least two mobiles (or a mobile and a control station) and a base station placed-in-operation by the one-year deadline. [23]

II. Continuance of Operation

11. *Proposal.* The *Notice* underscored that a private land mobile radio license is valid only as long as the station continues to operate. A station that has discontinued operations for one year or more is deemed to have permanently discontinued operations. 47 C.F.R. § 90.157. In this circumstance, the licensee is required to return its authorization to the Commission for cancellation, or alternatively, to notify the Commission of its discontinued operation by filing FCC Form 405-A. The actual forwarding of the license to the Commission for cancellation is a purely ministerial function. In the *Notice* we proposed to clarify our rule by explicitly stating that a license cancels *automatically* upon discontinued operations for one year or more, regardless of whether the licensee notifies the Commission that it has discontinued operations. 5 FCC Rcd at 6401.

12. *Comments.* Most commenters agree with our interpretation that a license cancels automatically upon one year of discontinued operation. [24] Arguing for a stricter interpretation of discontinued operations, some commenters urge that licenses should cancel automatically after a shorter period of discontinued operation, such as 90 days. [25] They feel that one year is too long to permit spectrum to be unused. Other comments ask for a more flexible treatment of permanently discontinued operations. While these commenters support automatic cancellation, they want the Commission to provide licensees with opportunities to request extensions beyond the one-year mark for justifiable reasons. [26]

13. Public safety and local governmental entities argue that their operations should not be presumed to be discontinued permanently if they have not operated for a year. APCO notes that discontinued operations on certain channels, such as those used for emergency purposes, does not always indicate an intent to abandon the assigned channels. [27]

14. *Decision.* We adopt our clarification that a license cancels automatically upon discontinued operation for a period of one year or more. The year-long period for discontinuance strikes a balance between the licensee's need for operational flexibility and our need to ensure efficient utilization of authorized channels. We recognize that some licensees may operate on a seasonal basis, experience temporary financial problems, or face an unforeseeable problem that causes them to discontinue operations temporarily. A year is the maximum, reasonable period to allow such discontinuance of operations. Our rule retains its ministerial provision requiring licensees to notify the Commission directly of discontinued operations,[28] but their failure to do so will not prevent

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[17] Comments of Fleet Call at 4.

[18] Comments of Motorola at 4; MRFAC at 3-4.

[19] Comments of CICS at 3; Discom at 3; Fleet Call at 3.

[20] For those licensees with extended implementation schedules (*See* 47 C.F.R. § 90.629), the appropriate construction/placed-in-operation deadline will apply.

[21] We will not require licensees to notify the Commission directly when they have completed construction and placed their systems in operation. We have an ongoing program to monitor licensee compliance with our rules.

[22] *See System 800, supra.*

[23] For purposes of this placed-in-operation rule, control stations will be considered "mobiles."

[24] Comments of AASHTO at 3; AMI at 14; APCO at 7; CICS at 4; Discom at 4; Fleet Call at 5; Mobile Radio Resources at 3; Motorola at 5; NABER at 18; SIRSA at 12; UTC at 6; Reply Comments of API at 6-7.

[25] Celpage at 4-5; Palidor at 6.

[26] Comments of AASHTO at 3; AMI at 14; Discom at 4.

[27] Comments of APCO at 7. APCO supports the discontinuance proposal but wants public safety licensees to be notified of an impending cancellation in order to give them a reasonable opportunity to demonstrate any extenuating circumstances and the impact the cancellation would have on their public safety functions.

[28] We note that in our proceeding regarding the assignment of SMR category channels outside the Designated Filing Areas, a more stringent discontinued operation standard has been proposed for SMRs (to defeat the identified problem of "base stations on wheels" -- the temporarily erected stations used solely to meet our construction standards). *See* Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd 8678 (1989),

automatic cancellation. [29] We decline to codify any specific reasons that would permit the discontinuance of operations nor are we inclined to carve out any special, flexible exemptions from our rule for certain classes of licensees. Any licensees experiencing special circumstances may continue to request a waiver of Section 90.157 of our Rules, and we will evaluate each request on a case-by-case basis.

III. License Renewal/Reinstatement Policies

Reinstatement Period

15. *Proposal.* Our reinstatement policies grew out of the steps we have taken to assure the smooth functioning of our licensing processes. In the past, it has taken approximately six months to clear our records of expired licenses. During this period, the frequencies covered by the expired licenses have generally not been available for reassignment. As an accommodation to those licensees that have allowed their licenses to expire, we currently permit such licensees to reapply for their old licenses within six months of the expiration of the license. [30] If a licensee does not file a reinstatement request within this six-month period, the station authorization is deleted from our license records and the channel becomes available for reassignment. [31]

16. We proposed to reduce the reinstatement period from six months to 90 days and to codify this change in our Rules. [32] We requested comments on other options for the disposition of licenses that have not been renewed, such as reducing further or eliminating the period during which reinstatement requests will be accepted. Also, we tentatively decided to reject NABER's suggestion that licensees seeking to file reinstatement requests more than 30 days after license expiration be required to obtain a new frequency coordination. *Notice,* 5 FCC Rcd at 6403.[33]

17. *Comments.* The majority of commenters support the proposal to reduce the reinstatement period to 90 days as proposed." [34] Several commenters, however, view the 90-day period as too accommodating towards licensees that neglect their responsibility to file timely renewal applications, and support a shorter reinstatement period.[35]

18. Those commenters who oppose reducing the six-month reinstatement period are primarily public safety organizations and governmental entities.[36] These entities foresee that oversights by government agencies in not timely renewing licensees will result in severe disruption of communications systems necessary to provide essential services to the public. APCO argues that for this reason, public safety licensees should be given every reasonable opportunity to rectify any failure to renew their licenses.[37] In addition, APCO urges that a frequency coordination should be performed for licensees submitting renewal applications more than 30 days after the expiration of their licenses.[38]

19. *Decision.* We are persuaded that the public interest would be served through a reduction of the current six-month period. We are also, however, persuaded that to accept requests for license reinstatement up to 90 days after the license has expired is inconsistent with our expectation that licensees must meet their responsibility to file a *timely* renewal application if they intend to seek renewal of their station authorizations. Compliance with our rules requires licensees to seek renewal of their authorizations in a timely and responsible manner. Failure to submit a formal license renewal application prior to license expiration results in the automatic cancellation of the underlying license on its expiration date. [39] Our current practice of accepting renewal applications filed after a license has expired is, therefore only an accommodation to former licensees because the mechanics of our licensing processes do not permit the immediate deletion of expired licenses from our records. Given that our processes now permit faster deletion of expired licenses from our records, and because of our desire to ensure the rapid reassignment of channels, we will reduce the time period during which we will accept applications for reinstatement and renewal of an expired license to 30 days following expiration of a license, and will amend our rules accordingly.[40] We caution licensees, however, that there is no guarantee that we will grant such applications and that, even if we do, they may be subject to forfeitures for unauthorized operation.

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para. 40. Section 90.157 of our Rules will continue to apply to SMRs, subject to the more stringent requirements that we may adopt in PR Docket No. 89-553.

[29] Our construction and operation requirements are conditions placed on each license. *See* P & R Temmer v. FCC, 743 F. 2d 918 (D.C. Cir. 1984).

[30] Because licensees do not retain any rights to operate their stations after expiration of their licenses, continued operation beyond the expiration date without the filing of timely renewal requests technically constitutes unlicensed operations. *See* 47 U.S.C. § 301.

[31] In general, a frequency remains unavailable for reassignment until the license is deleted from our automated database licensing records. The deletion, which alerts all interested applicants and the coordinators that the channels are available, occurs approximately seven months after the date of license expiration. *But see* para. 26, *supra.*

[32] *See* 5 FCC Rcd at 6402. Current policy is stated on our application materials, which indicate our current policy that licensees that have expired for more than six months are not eligible for reinstatement. FCC Form 574 Instructions at 25 (August 1989).

[33] *See Notice,* 5 FCC Rcd at 6402. Frequency coordination remains valid for six months after license expiration. 47 C.F.R. § 90.175.

[34] Comments of AMI at 15; AMS at 12; ASNA at 8-9; Celpage at 5; CICS at 5; Discom at 4; FIT at 2; Fleet Call at 8; IMSA/IAFC at 3; MRFAC at 23; Mobile Radio Resources at 4; Motorola at 5-6; NABER at 18; Parcco at 2; SIRSA at 14; UTC at 6-7; and Reply comments of API at 7.

[35] Comments of FIT at 2 (60 days); NABER at 18 (30 days); Palidor at 3 (a transition program to 30 days); and City of Pasadena at 4-5 (30 days).

[36] Comments of AASHTO at 2; APCO at 8-9; Blooston Mordkofsky at 2; County of Los Angeles at 1;and Montana at 1.

[37] Comments of APCO at 8-9. APCO further recommends that the Commission issue a second renewal notice to public safety licensees before automatically cancelling a license.

[38] Comments of APCO at 9-10. Opposing Comments of MRFAC at 3. *See also* Comments of Montana at 2; UTC at 8.

[39] *See* 47 U.S.C. § 308(a).

[40] The 30-day reinstatement period comports with the statutorily-required period during which a former licensee may seek to reconsider the automatic cancellation of an expired license. 47 U.S.C. § 405(a).

20. We believe that the 30-day period for reinstatement and late-filed renewal applications offers sufficient opportunity for all licensees to renew their licenses. We decline to provide a "second notice" to licensees that are in danger of losing their licenses for failure to renew in a timely manner. [41] Additionally, we will not provide special consideration to certain classes of licensees. That a licensee is engaged in public safety activities does not justify a lesser degree of diligence in complying with our renewal procedures. Moreover, it is in the interest of *all* private land mobile users to retain their assigned frequencies by timely filing renewals. [42]

21. We also confirm that a new frequency coordination is not required for a request for reinstatement and late-filed renewal filed within 30 days of license expiration . A frequency coordination is only required when an applicant seeks new or modified facilities -- actions that result in changes to our database records. An existing licensee merely seeking to reinstate and renew an expired license for existing facilities is adding nothing to our licensing records and thus a new frequency coordination is not necessary. An application filed after the passing of this reinstatement period will, however, require the filing of a new application, complete with a new coordination, because pertinent information will have been deleted from coordinator and FCC databases.

Database Deletion

22. *Proposal.* In the *Notice,* we addressed SIRSA's petition to make frequencies encumbered by expired licenses available for reassignment more rapidly. [43] Taking into consideration our initial proposal for the 90-day reinstatement period, we outlined a "four-month" database deletion policy. On the last business day of each month we would delete from our records the licenses that expired in the fourth calendar month previously and for which we had not received reinstatement/renewal applications within 90 days after the expiration of the license. The extra month between the end of the late-filed renewal period and the actual database deletion would provide our staff the time needed to review and process any reinstatement/late-filed renewal applications arriving at or near the end of the 90-day period. This would reduce the chances for the inadvertent assignment by a coordinator of a frequency belonging to a licensee that *had* filed a reinstatement/late-filed renewal application within the 90-day period.

23. *Comments.* Most commenters stress the importance of establishing a "date-certain" when a frequency becomes available for coordination and reassignment. [44] A few commenters support the original SIRSA proposal. [45] Other commenters, such as FIT and Pasadena, support reinstatement periods of less than 90 days. [46] ASNA requests that we clarify an additional point. In the case where an applicant requests the frequency assignment of a license that is to be deleted from our database, ASNA asks whether the coordinator will be permitted to assign the frequency to an applicant that has submitted an application *prior* to the actual database deletion, or whether the coordinator must only accept applications received on or after the actual date of deletion. [47]

24. *Decision.* To reflect our new 30-day period for acceptance of requests for reinstatement/late-filed renewal, we modify our original databasedeletion proposal and adopt a "two-month" plan for deleting expired licensees that have not been timely renewed and for which a request for reinstatement/ late-filed renewal has not been filed within 30 days from the date of license expiration. According to this plan, on the last business day of each month, we will delete from our records those licenses that have expired in the second calendar month previously and for which we have not received reinstatement/ late-filed renewal applications within the required 30-day period. [48] Under this plan, frequencies covered by expired licenses will be made available for assignment approximately five months sooner than under our current procedures.[49]

25. Finally, we fully expect to be able to delete licenses in accordance with our new two-month deletion policy. While this policy should provide greater certainty as to when deletion will occur, it does not provide a *guarantee* that the deletion has taken place. Certain instances may arise, due, for example, to technical difficulties, where deletion cannot occur precisely at the close of the second

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[41] While we do send renewal notices to licensees, such notices are not required, and we take no responsibility for any failure to send or receive such notices. The act of filing a renewal application remains the exclusive responsibility of the licensee.

[42] We will continue to retain discretion in extraordinary circumstances to waive our reinstatement/late-filed renewal rules if warranted by particular circumstances. *See* Memorandum Opinion and Order, 4 FCC Rcd 4488 (1989) (*New York City Transit Authority).*

[43] *Notice,* 5 FCC Rcd at 6402. In its Petition for Rule Making, SIRSA originally proposed to allow frequency coordinators to recommend frequency assignments on the 91st day after license expiration, regardless of whether the license is deleted from our records.

[44] Comments of AMI at 15; ASNA at 10; CICS at 6; SIRSA at 14-15; UTC at 9-10; Mobile Radio Resources at 4; NABER at 19.

[45] Comments of Celpage at 6; Reply comments of CICS at 11.

[46] Comments of FIT at 3 (supporting frequency recommendation the day after the end of a 60-day reinstatement period); City of Pasadena at 4-5 (supporting frequency recommendation the day after the end of a 30-day reinstatement period).

[47] Comments of ASNA at 10.

[48] The following example illustrates the database deletion policy which is adopted herein. All licenses expiring in January, 1992 would be deleted from our records on the last business day of March, 1992 if reinstatement requests have not been filed within 30 days of expiration (regardless of whether that 30th day falls in February or March). *See* 47 C.F.R. § 1.4(e)(2). For example, a licensee whose license expires on Wednesday, January 1, 1992 will have until Friday, January 31, 1992 to file a reinstatement application. *See* 47 C.F.R. § 1.4(c). If such an application is not filed by that date, the scheduled deletion from our data base of that license will be Tuesday, March 31, 1992. *See* 47 C.F.R. § 1.4(d). Likewise, the record of a license expiring on Friday, January 31, 1992 (the end of the month) will also be deleted on March 31, 1992 if a reinstatement application has not been filed by Monday, March 2, 1992. (In this instance, since the 30th day following license expiration falls on a Sunday, the operative deadline for filing a request for reinstatement/late-filed renewal is the following business day. *See* 47 C.F.R. § 1.4(j)).

[49] It should be made clear that regardless of *when* a licensee's license expires (either at the beginning, the middle, or the end of a month) that licensee, and *all* licensees, will have no more than 30 days to file for license reinstatement. Our decision to conduct a single database deletion per month is made strictly to maintain administrative efficiency and conserve administrative resources.

calendar month and our database continues to reflect the frequencies of the expired license. Under no circumstances will we accept an application for a particular frequency until that frequency has actually been deleted from our database -- unless the application is accompanied by a "finder's preference" award letter. *See* para. 72, *infra.*

26. In response to the related issue of ASNA's request for clarification, *see* para. 23, *supra,* we find that frequencies associated with deleted licenses may be recommended by coordinators *only* to those applicants submitting applications received by the coordinator on or after the date of deletion.[50] Before the deletion occurs, our database lists the subject frequencies as "encumbered." To permit coordinators to entertain applications for frequencies before they become unencumbered (i.e., available to others) would be unfair to applicants who await changes in the database before submitting applications. [51]

Form Simplification for Reinstatement/Late Renewal

27. *Proposal.* Currently, private land mobile radio applicants applying to renew their authorizations may file either an FCC Form 574-R or an FCC Form 405-A. [52] A licensee seeking reinstatement, however, is required to file an FCC Form 574 -- a more complex form used primarily by applicants for new land mobile radio facilities. Applicants seeking reinstatement nonetheless often mistakenly file either a Form 574-R or 405-A. In the past, we have returned these applications and required licensees to resubmit their reinstatement requests on a Form 574. To make the reinstatement process simpler, the *Notice* proposed to give licensees wider latitude regarding the appropriate application form to use in filing for reinstatement. 5 FCC Rcd at 6403. We proposed that licensees filing for reinstatement and not requesting modification of their licenses could submit FCC Form 405-A, Form 574, or Form 574-R.

28. *Comments.* Many commenters support our proposal because these simpler forms would reduce the licensee's administrative burden and still provide sufficient information for our processing. [53] In opposition, APCO favors the sole use of Form 574 because the information contained in the Form 574, plus the additional information that they require from their applicants, results in an improved APCO database. [54]

29. *Decision.* We adopt our proposal to permit those licensees requesting reinstatement, without modification of their license and within 30 days of expiration, to use any of the three forms. The completed Form 574 does not provide our database (or a coordinator's database) with additional relevant information in cases of routine reinstatement of unmodified facilities. Use of the shorter Forms 574-R and 405-A will make reinstatement easier for licensees and will simplify our processing.

IV. The Finder's Preference Program

A. Introductory Discussion

30. *Proposal.* As discussed in earlier sections of this *Report and Order,* private land mobile licensees must comply with certain Commission requirements to maintain their station authorization. If compliance with our construction and operational rules does not occur, the underlying authorizations will cancel and we will recover and reassign the affected channels. To expedite reassignment of channels that are not being utilized effectively and to achieve uniform frequency coordination procedures, SIRSA and NABER outlined a concept called "finder's preference." [55] Finder's preference establishes a series of incentives for persons to help us recover channels in the 220-222 MHz,470-512 MHz and the 800/900 MHz bands. While we currently conduct reviews at regular intervals to determine whether our licensees are in compliance with our construction and loading requirements, the finder's preference program would supplement these efforts. More importantly, those "finders" who offer us assistance in the recovery of channels by informing us about licensees not in compliance with our rules would be given a dispositive "preference" to become licensed for the recovered channels. Our proposal, as outlined in the *Notice,* differed in several respects from the SIRSA/NABER plan. However, both proposals share the goal of improving licensee adherence to our rules and promoting reassignment of channels to persons who will use them productively.

31. *Comments.* Most commenters support the concept of finder's preference. [56] SIRSA remarks that the finder's preference would help the Commission with its enforcement and compliance activities, facilitate the recovery of underutilized channels, provide increased incentives for licensee self-policing, and improve the accuracy of the Commission's database. [57] The City of Pasadena suggests that public safety eligibles be given an additional preference over other potential finders because of the essential services they provide. [58]

32. The few commenters opposed to finder's preference believe that it is an inappropriate mechanism for improving spectrum efficiency.[59] Motorola, APCO and AASHTO

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[50] The exception to this rule would be the instance where the applicant is requesting an unspecified frequency in a particular service. In this instance, the coordinator could accept that applicant's application prior to the deletion from the database of the frequency ultimately assigned to the applicant.

[51] The retention by coordinators of multiple applications for encumbered frequencies could lead to the establishment of coordinator "waiting lists." This would be unacceptable and counter to long-standing Commission policy.

[52] *See* 47 C.F.R. § 90.119.

[53] Comments of AMI at 15; ASNA at 9; Blooston Mordkofsky at 3-6; CICS at 5-6; FIT at 3; IMSA/IAFC at 3-4; County of Los Angeles at 2; MRFAC at 3; Motorola at 7; SIRSA at 15; and UTC at 10-11.

[54] Comments of APCO at 10.

[55] *See Notice,* 5 FCC Rcd at 6403-6405, discussing letters from Mark E. Crosby, President, SIRSA, and Emmett B. Kitchen, Jr., President, NABER, to Ralph A. Haller, Chief, Private Radio Bureau (June 30, 1988, and October 18, 1989).

[56] Comments of AMI at 3; AMS at 11; ASNA at 4; Celpage at 8; CICS at 7; Discom at 1, 4; Fleet Call at 11; FIT at 4; MRFAC at 4; Mobile Radio Resources at 1; Motorola at 8; NABER at 4-5; Palidor at 1; Parcco at 1; City of Pasadena at 5; SIRSA at 16; UTC at 11; and Reply Comments of API at 9.

[57] Comments of SIRSA at 16.

[58] Comments of City of Pasadena at 6.

[59] Comments of AASHTO at 2; APCO at 10; County of Los Angeles at 2.

are concerned there is a danger of "vigilante justice" or "bounty hunting" by finders that will slow down rather than expedite the enforcement process.[60] The County of Los Angeles is also concerned that the program will disrupt the development of regional public safety plans and that all public safety services should be exempt from finder's preference. [61] CICS disagrees, noting that spectrum underutilization is as likely to occur in the public safety services as in any of the other private land mobile radio service. [62]

33. *Decision.* We find the potential benefits of implementing a finder's preference program are in the public interest. In many areas of the country, it is difficult for new applicants to become licensed or for existing licensees to expand their systems because of the scarcity of available spectrum. By offering a means for recapturing unused channels, we will expand licensing opportunities in these areas.

34. We now conduct compliance review activities at regular intervals to determine whether applicants are in compliance with our construction and loading requirements. In implementing the finder's preference program, we are in no way reducing these compliance activities. The program will merely serve to supplement compliance efforts by providing incentives for parties to survey private land mobile usage and identify licensees who have failed to construct, place in operation, or continue to operate their stations.

35. In establishing a finder's preference, we have considered *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*), which requires the Commission to give comparative consideration to all *bona fide* mutually exclusive applications but also permits the Commission to establish threshold standards before applicants are entitled to comparative consideration. APCO argues that the finder's preference scheme violates *Ashbacker* because the Commission has established threshold qualifications that necessarily create a class of one and that are unrelated to the applicant's prospective operation of the license. Comments of APCO at 10-11. We disagree and conclude that finder's preference is consistent with *Ashbacker*. The Supreme Court has held that in the context of a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy in order to be eligible for comparative consideration. [63] Satisfying our criteria for obtaining a dispositive finder's preference amounts to a threshold standard that is determinative of eligibility for comparative consideration. In some circumstances, threshold standards may limit eligibility to a class of one. *See also* Report and Order, Gen. Docket No. 90-217, FCC 91-112, at para. 33 (released May 13, 1991) (*"Pioneer's Preference"*).

36. In the implementation of the finder's preference program we confirm that the program will be restricted to eligibles in the private land mobile radio services and that a "finder" must be eligible for the channels in question.[64] Thus, a finder eligible in the Business Radio Service or the SMRS would be permitted, through intercategory sharing, to acquire channels "found" in, for example, the 800 MHz Industrial/Land Transportation or General Category pools. [65]

37. With regard to implementation of the finder's preference program for public safety entities, we consider two opposing points of view expressed in the comments. Some argue that because public safety entities supply essential services to the public and could not tolerate any disruption to that service through the loss of channels, they should not be subject to the finder's preference program. Others suggest, however, that due to the important nature of the service provided by public safety, public safety "finders" should be given *more* favorable treatment than other finders. Still others argue that public safety entities should be subject to the same rule requirements as other land mobile users. We agree with the latter opinion. If a public safety agency is not making use of its assigned channels, finders should be permitted to bring this to our attention and be awarded a preference for these channels.[66]

38. While we will apply finder's preference generally to the public safety services, we recognize two specific instances where the finder's preference program will *not* apply to public safety. First, we note that, since the development of the National Plan for Public Safety in 1987, Regional Public Safety Planning Committees have been involved in the process of recommending the assignment of the 821-824/866-869 MHz spectrum to applicants having the highest priorities and greatest communications needs in their regions. The finder's preference program could enable applicants to circumvent this process [67] and this would be counter to our intent in developing the regional planning concept. We will therefore not apply finder's preference in those instances where the frequencies in question are those frequencies covered by a Regional Public Safety Plan [68] -- unless the finder's request is accompanied by a written statement from the affected Regional Planning Committee declaring that acquisition of the frequencies by the finder is not inconsistent with the Regional Plan.

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[60] Comments of Motorola at 9; APCO at 10; AASHTO at 2.

[61] Comments of County of Los Angeles at 2. API supports exclusion of the 821-824/866-869 MHz public safety channels, but urges that all other public safety channels be subject to a finder's preference. Reply Comments of API at 9.

[62] Reply Comments of CICS at 7.

[63] United States v. Storer Broadcasting Co., 351 U.S. 192,202-205 (1956). *See also*, Public Utilities Commission of California v. FERC,900 F.2d 269 (D.C. Cir. 1990); Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989).

[64] We confirm also that we retain our right to review preference requests to assure that the awarding of the preference is in the public interest, including compliance with all qualifications requirements.

[65] The General Category channels are available on an equal basis to all private land mobile users. *See* 47 C.F.R. § 90.615.

[66] Further, we find no justification for giving heightened consideration to finders in the public safety services or any other services and will treat all finders on an equal basis.

[67] Public safety regions have established criteria to prioritize applicants for public safety channels. If the finder's preference program were to be implemented on these channels, an applicant with a relatively low priority could, as a "finder," acquire channels meant for a more deserving applicant.

[68] This would include the frequencies in the 821-824/866-869 MHz band as well as any other public safety frequencies that may be included in a particular Regional Plan.

39. There is a second instance where the finder's preference program will not apply. Business and Industrial/Land Transportation Radio Service entities, while *eligible* for channels in the 800 MHz Public Safety Category Pool through our intercategory sharing provisions, [69] will not be permitted to acquire a finder's preference for occupied channels in that pool. We established this pool to help provide needed spectrum for the Public Safety Services. While *unoccupied* channels in this pool will continue to be made available to deserving non-public safety applicants (through intercategory sharing) we find that it would be inappropriate for occupied channels in this pool to be subject to acquisition by non-public safety eligibles through the finder's preference. [70] We will, however, permit *public safety* entities to obtain a finder's preference for channels occupied by *other* public safety entities in this pool Our decision, in this regard, is based on our continuing belief that channels in the public safety pool are to be reserved for primary use of public safety entities.[71] Any redistribution of these channels to non-public safety eligibles in areas where there is a need for all available public safety channels would be counter to the Congressional mandate to provide sufficient spectrum for public safety.

B. Implementation of the Finder's Preference Program

40. We outline below the procedures that must be followed and the conditions that must be satisfied by individuals wishing to acquire a finder's preference. Specifically, we indicate (1) which frequencies will be subject to a finder's preference, (2) which types of violations will result in the awarding of a preference, (3) the contents of a preference request, (4) the procedures for filing a request, and (5) how the Commission will process the preference requests.

1. Frequencies Subject to the Preference

41. *Proposals.* We proposed to limit our finder's preference scheme to frequencies that are assigned on an exclusive basis. Unlike channels assigned on a shared basis, exclusive assigments preclude others from being licensed. [72] We also proposed that the Specialized Mobile Radio (SMR) channels in the 800/900 MHz bands not be subject to a finder's preference. 5 FCC Rcd at 6403. We noted that the established waiting-list procedures applicable to those &markets where all channels are licensed already serve as an effective reassignment mechanism for recovered channels. While we projected that marketplace monitoring of the SMR industry could uncover instances of significant underutilization of channels that our existing compliance procedures do not reveal, we requested comments on possible alternatives to the waiting-list system that could incorporate the finder's preference concept.

42. *Comments.* Most commenters support our proposal to apply the finder's preference only to exclusive chann el assignments. [73] Several commenters also urged the Commission to increase compliance action on the shared bands. [74] In contrast, several comments emphasize that shared channels should be included in the finder's preference program.[75]

43. Comments were divided over the issue of whether to include SMRs in the finder's preference scheme and the future role of waiting-lists in the reassignment of recovered SMR channels. Commenters opposed to including SMRs within the scope of finder's preference emphasize that the current waiting-list procedures satisfactorily assign available SMR frequencies in congested markets.[76] Other commenters argue that SMR licensees should be subject to finders preference, thus treating SMRs like other private land mobile eligibles under the preference program.[77] Still other commenters suggest alternative approaches that would keep the SMR waiting-list while permitting a finder's preference for SMR channels. [78]

44. *Decision.* We adopt our initial proposal to apply the finder's preference to those frequencies assigned on an exclusive basis in the 220-222 MHz,470-512 MHz, and 800/900 MHz bands. Our analysis of the record confirms that employing the costly, resource-intensive effort required in submitting a finder's preference request is *only* justified if the frequencies acquired are exclusive assignments. As the *Notice* explained, there can be no preclusion of eligible new applicants from being licensed on shared spectrum. A "preference" awarded to an applicant applying for a shared channel would, therefore, offer no *greater* opportunity for acquiring a particular channel than that which is "already available under current frequency coordination procedures. [79]

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[69] *See* 47 C.F.R. § 90.621(g).

[70] The Conference Report on the Communications Amendments Act of 1982 expressed particular concern about "radio services which are necessary for the safety of life and property and [urged] the Commission to carefully consider the legitimate needs of public safety agencies in managing the private land mobile spectrum." H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 52-53 (1982).

[71] There is an instance, however, in which channels occupied by a public safety entity *could* be acquired by a "finder" that is not a public safety eligible. This could occur if the finder is eligible in either the Business or Industrial/Land Transportation Services and the channels in question are assigned to a public safety entity licensed in the 800 MHz General Category pool.

[72] *See Notice,* 5 FCC Rcd at 6403. We have provided for exclusive assignments in the 220-222 MHz, 470-512 MHz and 800/900 MHz bands.

[73] Comments ASNA at 5-6; FIT at 4; MRFAC at 4; Mobile Radio Resources at 5; NABER at 5, 7; SIRSA at 21; UTC at 12; and Reply Comments of API at 9.

[74] *See* Comments of NABER at 4-5; Reply comments of SIRSA at 6.

[75] Comments of Celpage at 9; CICS at 7; Motorola at 8.

[76] Comments of AMI at 9-10; AMS at 11; ASNA at 4-5; Discom at 5; Fleet Call at 10.

[77] Comments of CICS at 9-10; FIT at 4; SIRSA at 21; UTC at 12; Reply Comments of API at 9; and Reply Comments of Motorola at 2-3.

[78] Comments of SIRSA at 21-22; UTC at 12-13; CICS at 10-12; Reply Comments of Motorola at 3-4.

[79] We will, however, reserve the right, at any time in the future, to extend the application of finder's preference to certain channels that are currently shared. See Notice of Inquiry, PR Docket 91-170, 6 FCC Rcd 4126 (1991) (possible conversion of shared channels to exclusive assignments). Specifically, we delegate authority to the Chief, Private Radio Bureau to extend finder's preference to the shared, conventional channels below 800 MHz and in the 800 MHz General Category pool. *See* 47 C.F.R. § 0.331. The decision to take such action will depend on

45. We have given further consideration to the applicability of finder's preference to SMR-category channels. We find these comments persuasive and will therefore modify our initial proposal to provide for application of finder's preference to SMR-category channels.[80]

46. First, we will continue to maintain and utilize the waiting-lists for 800 MHz SMR channels. The waiting-lists have provided us with an effective means for reassigning SMR frequencies. Applicants on waiting lists already have the incentive to uncover violations of existing licensees to advance their position on the waiting list. We also believe that the waiting-list procedures have provided us with an orderly assignment mechanism and have limited the number of frivolous claims by prospective applicants. We conclude, however, that while the use of waiting-lists, exclusively, would continue to be an effective method for reassigning SMR channels, the added incentive of applying the finder's preference to SMR channels would enhance our overall channel recovery efforts. We therefore adopt the procedure suggested by SIRSA and UTC. That is, we will maintain our current waiting lists, and if *we* recover an SMR channel because of our own investigation or ongoing compliance actions, then that recovered channel will be reassigned according to our current waiting-list procedures. If, on the other hand, a finder provides the information leading to the recovery of a channel through the finder's preference program, then that person or entity will be awarded a dispositive preference in acquiring a license on that channel.[81]

2. Scope of rule violations that qualify for finder's preference

Construction, Operation and Loading

47. *Proposal.* The *Notice* indicated that the finder's preference would apply to those finders who constructively and effectively assist us in recovering channels. We viewed the finder's preference program as a supplement to and not a substitute for our current compliance activities and proposed that the violation of certain Commission rules would be grounds for filing and granting a finder's preference. [82] The *Notice* proposed that these rules include our requirements for constructing a station, placing a station in operation, continuing to operate a station, and loading a station with the necessary number of mobile units.

48. *Comments.* Most of the commenters support the applicability of a finder's preference to violations of our construction, operation, discontinuance, and loading violations – consistent with our proposal. [83] These commenters advocate using finder's preference to detect any violation that would lead to the recovery and reassignment of channels. In contrast, some commenters are concerned that certain of the proposed violations, such as "failure to timely load a system," are not easily proven, and recommend that we limit finder's preference to construction and operational issues because these types of violations may be more easily discerned from objective facts.[84] The majority of commenters also favor some form of consensual finder's preference, (otherwise known as "surrender and get") where a finder arranges for voluntary license cancellation with a licensee that anticipates being unable to construct, operate or load its system.[85]

49. *Decision.* We will not include "loading" among the violations that will be available under finder's preference but will apply finder's preference to violations of our construction, placed-in-operation and discontinuance-of-operation rules.[86] In determining which types of violations would qualify under finder's preference, we considered several factors, including the level of difficulty in conclusively proving a violation, the time and resources needed to investigate various kinds of rule violations, and the likelihood of a finder readily establishing a violation of a particular rule. For violations of our construction, placed-in-operation, and discontinuance-of-operation rules [87] we anticipate that the documentation necessary to make a *prima facie* case will be relatively straightforward. On the other hand, we concede that it would be difficult to generate conclusive evidence of loading violations. Loading is a dynamic concept that, by its very nature, can vary from day to day. We must initially limit the finder's preference strictly to those rule violations that lend themselves to conclusive and expeditious action.

50. Regarding the "consensual" form of finder's preference (i.e., "surrender and get") in the context of stations that have permanently discontinued operations, such finder's requests are only distinguished from other finder's requests in that we will waive the requirement that the finder serve its request on the target licensee. On the use of "surrender and get" in the context of unconstructed facilities, we agree with ASNA that the type of complicity that might occur between a finder and the licensee of an unconstructed system in the "surrender and get" scenario would conflict with our prohibition on "bare license" assignments.[88] We will permit "surrender and get" with regard to unconstructed facilities, however, under the following condition. If a "finder" arranges with an existing licensee to request voluntary license cancellation *prior* to the end of the licensee's eight-month or one-year construction/operation deadline, the finder, upon acquisition of the license, will be required to complete construction and place the system in operation by the original licensee's construction/operation deadline. Under this scenario, however, we will require both the finder and the target licensee to file, together with the finder's request, certifications of noncompensation. *See* para. 56, *infra.*

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the Bureau's judgment of whether the burden of processing and investigating these additional finder's requests can be absorbed by its staff.

[80] Comments of CICS at 11; Reply Comments of API at 9.

[81] The submission of a finder's preference request may only occur *after* the Commission has had an opportunity to conduct an investigation. *See* para. 62 regarding the "timing" of finder's preference requests.

[82] The *Notice* specifically addressed violations of 47 C.F.R. §§ 90.155, 90.157, 90.313, 90.929, 90.631, and 90.633.

[83] *S ee* Comments of UTC at 13.

[84] *See, e.g.,* Comments of NABER at 7.

[85] Comments of ASNA at 7-8; SIRSA at 21.

[86] *See* 47 C.F.R. §§ 90.155, 90.157, 90.629, 90.631(e) and (f), 90.633(c) and (d).

[87] *See* 47 C.F.R. §§ 90.629, 90.631 and 90.633.

[88] "Bare license" assignments refer to the assignment of unconstructed licensed facilities.

3. Contents of a finder's preference request

a. Request Format

51. *Proposals.* We proposed that a finder's request include (1) the name and address of the licensee; (2) the licensee's call sign and the location of the licensed facility; (3) the frequencies of the licensed facility; (4) the Commission rule that the licensee is allegedly violating; (5) a statement of how the licensee is violating this rule, including the dates of any provisions or benchmarks the licensee failed to meet; and (6) a detailed statement as to the specific basis for the applicant's knowledge of the alleged violation. *Notice,* 5 FCC Rcd at 6404. We clarified that conclusory or general statements would not be sufficient for us to start an investigation.

52. *Comments/Decision.* Commenters viewed our filing requirements favorably.[89] We find no independent reason to alter our original proposal. We therefore adopt the requirements as described in the *Notice.* If these elements are not included in the finder's request, we will dismiss the request without further action.

b. Additional Statements in Request

53. *Proposals.* We proposed that the request letter formally state that a preference for specified channels is being sought. This requirement will help distinguish preference requests from the numerous general complaints about licensees, and reduce the possibility of subsequent disputes over whether a finder's preference was being requested. In addition, we proposed that the finder's request letter must be made in the form of a declaration under penalty of perjury to underscore our expectation that all statements made by the finder will be truthful. *Notice,* 5 FCC Rcd at 6404, *citing* 47 C.F.R. § 1.16. To facilitate the investigatory process, the *Notice* also proposed that a finder serve a copy of the preference request on the target licensee, and submit a statement that such service had been accomplished. Finally, the *Notice* inquired whether a finder seeking a preference should certify that it had not compensated, in any way, the licensee of an unconstructed station. 5 FCC Rcd at 6405.

54. *Comments.* Several commenters applaud our proposal.[90] Some commenters, however, feel that the preference request need not be served initially on the target licensee, as, they claim, the Commission will ultimately contact the licensee during the course of its investigation of the alleged violations.[91] These commenters point out that such service could provide target licensees with an opportunity to bring their systems into compliance prior to the initiation of the investigation. [92] On the issue of whether finders should certify non-compensation of unconstructed licensees, one commenter supports this proposal because it would prevent the for-profit assignment of unconstructed station authorizations.[93] Another commenter, however, would permit compensation to an existing licensee provided the licensee's stations have been constructed and are being operated legitimately by the licensee.[94] In contrast, a third commenter believes that there is no need to require a finder's preference applicant to certify that it has not compensated the affected licensee because it is highly unlikely that entities would circumvent the existing prohibition against the assignment of unconstructed stations.[95]

55. *Decision.* We will require that all finder's preference requests be attested to by the applicant or a principal of the applicant either in the form of an affidavit or declaration under penalty of perjury. [96] Such declarations will aid us in any potential enforcement actions against those parties who may creatively use the preference program to harass other licensees or in other ways violate our rules or other federal laws. We also will require all finders to serve target licensees with a copy of the preference request. Such service shall be accomplished in accordance with the provisions of Section 1.47 of our Rules, 47 C.F.R. § 1.47. Direct service via the finder will conserve our administrative resources and should deter the filing of frivolous requests. [97] As indicated earlier in our discussion, however, in those instances where the finder's request is consensual because the target licensee voluntarily seeks license cancellation, we will waive the requirement that the target licensee be served. The provisions of Section 1.45 of our Rules will control the timeframe in which the target licensee may oppose the finder's request, and in which the finder may, in turn, respond to the target licensee's opposition. *See* 47 C.F.R. § 1.45.

56. Finally, we adopt our proposal to require certification of noncompensation where the finder's request involves a failure to construct. By requiring the finder to certify that the target licensee has not or will not receive consideration of any kind in connection with the request, we will reduce the likelihood of the finder's preference being used as a loophole to enable the assignment of unconstructed systems. We will interpret this requirement very strictly and will even look to such issues as the provision of service after construction to the original licensee at no cost or reduced cost. Should we find that there was any form of compensation, we will institute license revocation proceedings against the finder obtaining the license. We note that any false certifications to the Commission carry criminal penalties (18 U.S.C. § 1001).

4. Filing procedures for finder's preference

a. Status Check of Potential Target Licensees

57. *Proposal.* In the *Notice* we indicated that we did not propose to apply the preference to any case scheduled for regular review during our normal compliance activities or any case already under review or investigation. 5 FCC Rcd at 6404. We did, however, recognize that a potential finder would have an interest in determining whether a target licensee was currently under review. We suggested

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89 Comments of UTC at 14-15.
90 Comments of AMS at 12; ASNA at 6; UTC at 16.
91 Comments of AMI at 6-7; CICS at 20; SIRSA at 16.
92 Comments of ASNA at 6-7; Mobile Radio Resources at 5; Motorola at 9; NABER at 13.
93 Comments of UTC at 16-17.
94 Comments of Palidor at 2.
95 Comments of CICS at 21.
96 An unsworn declaration made under penalty of perjury can be substituted for an affidavit. *See* 47 C.F.R. § 1.16.
97 We are not concerned with the possibility that service on a target licensee may encourage "after-the-fact" compliance with our Rules. Rectifying the omission does not take away from the fact that the licensee may have violated our Rules.

that potential finders could contact our Compliance Branch to verify whether a licensee was the subject of a compliance action. *Notice*, 5 FCC Rcd at 6404 n. 30.

58. *Comments*. Several commenters support our proposal to limit the finder's preference to cases that are not already under compliance review or scheduled for such review. [98] CICS disagrees, indicating that a finder should be awarded "first-in-line" status regardless of the existence of scheduled or on-going compliance actions. [99] Those commenters who support our proposed limitation on finders' requests concur that there must be some reliable means of identifying which licensees are under review. [100]

59. *Decision*. We adopt our proposal to exempt from finder's preference the channels of those licensees scheduled or currently under review for violations by our Compliance Branch. While imposing this limitation on the availability of a preference may prove a disincentive to some, it was never our intention to offer finder's preference on an unrestricted basis. The finder's preference program will supplement rather than duplicate our compliance efforts. We do, however, appreciate that the finder needs to be given some guidance on whether a licensee is under review. Our original proposal -- to handle such inquiries over the phone -- is unsatisfactory because it could result in misunderstandings and would be a burden on our Compliance Branch. Instead, we adopt a policy that establishes a date-certain on which we will start to accept certain finder's requests.

60. A finder seeking a preference by reporting a licensee that has permanently discontinued operations may file a request at any point after the station has ceased operations for one year. [101] Our Compliance Branch does not schedule formal reviews of licensed facilities to determine whether there has been a permanent discontinuation of operations. We cannot, however, guarantee that the finder will not undertake some risk, albeit small, that we are already investigating the target licensee for discontinuance. [102] Under such circumstances, we will return the request to the finder with no further action.

61. We do have scheduled programs in place, however, to review the construction and operation of stations. We find it in the public interest to provide a greater degree of certainty regarding the timeliness of the request. To accomplish this, we establish specific timeframes for the filing of finder's requests for each of the two circumstances in which finders may identify licensees in violation of our construction/placed-in-operation rules. First, for the finder that files a request after obtaining consent from a target licensee that does not expect to be able to meet its eight-month or one-year deadline to construct and place its station in operation, the request must be filed in *advance* of the applicable deadline for constructing and placing the station in operation. [103]

62. Where the finder's request involves a licensee that has failed to construct or place its station in operation by the applicable construction/placed-in-operation deadline, we establish a 180-day window, beginning on the first day the license in question could be deemed to be in violation of our construction or placed-in-operation rules, during which we will not accept any finder's requests filed against that particular licensee. Thus, for a trunked 800 MHz licensee, the first day of the window would be the day after the oneyear anniversary of the license grant. During the 180-day window, the Compliance Branch will have an opportunity to determine whether the licensee has met our construction and placed-in-operation requirements. We anticipate that in those instances where violations are found, we will most likely cancel the underlying licenses *during* the 180-day window. On the first day after the close of the 180-day window, we will accept finder's requests for the licensee in question. We will accept the finder's request after the 180-day window has closed, unless we are still investigating the licensee for construction and operational violations, in which case the request will be returned. [104] It is our expectation that we may receive a number of finder's requests targeting the same licensee on the first day after the 180-day window closes. All acceptable finder's requests, filed on the same day will receive a preference and, if they all file otherwise acceptable applications, a lottery will be held between them pursuant to Section 1.972 of the Rules, 47 C.F.R. 1.972. [105]

b. Filing Procedures

63. *Proposal/Comments*. The *Notice* proposed that the applicant file the preference request with the Chief, Compliance Branch, Private Radio Bureau. This information must be sent by certified mail to establish the date the request was filed under our first-come, first-served processing system. ASNA suggests that our Gettysburg licensing facilities may be a better location to direct initial preference filings. [106]

64. *Decision*. We will require all finder's preference requests to be sent to the Compliance Branch, Private Radio Bureau. [107] The request should be mailed to the following address: Federal Communications Commission, Fee Correspondence, P.O. Box 358305, Pittsburgh, PA

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[98] Comments of NABER at 13; UTC at 13-14.

[99] Comments of CICS at 12-14.

[100] Comments of ASNA at 6; Comments of UTC at 13-14; Reply Comments of CICS at 10.

[101] *See* footnote 28, *supra*.

[102] For example, the Compliance Branch may have instituted an investigation based on another finder's request or information obtained from a source outside the finder's program (i.e. our Field Operations Bureau).

[103] Given that the successful finder will assume the construction deadline of the target licensee, we anticipate that the vast majority of such requests will be filed well in advance of the applicable deadline.

[104] If our investigation extends beyond the 180-day period, we will continue the investigation until completion and any channels recovered as a result of our investigation will be reassigned through our normal "firstcome, first-served" assignment procedures (or through the use of waiting-lists in the case of 800 MHz SMR Category channels).

[105] We also caution that a finder shall not have any interest whatsoever in more than one mutually exclusive finder's request.

[106] Comments of ASNA at 6.

[107] A few parties recommend that the finder should send a copy of its request to the relevant frequency coordinator to keep coordinators apprised of all investigations and to expedite grants. Comments of AMI at 12-13; ASNA at 7; NABER at 9-11; and SIRSA at 16-19. We disagree. Until a preference has actually been awarded, no grant of the subject frequencies can occur. We find, therefore, that prior to the granting of the preference, the coordinators will have no need to be informed of the existence of a finder's request.

15251-5305. [108] The date of Pittsburgh will establish the official finder's request filing date. From Pittsburgh, these requests will be routed to the Compliance Branch in Washington, D.C. for evaluation and processing.

c. Fees

65. The finder's preference appears most equivalent to a non-routine rule waiver because the application is not being processed through our regular first-come, first-served processing procedures. *See* 47 C.F.R. §§ 90.143(b) and 90.611(b). Each finder's preference request will therefore be treated as a rule waiver, and will require a non-refundable fee of $105, with each channel treated as a separate station for purposes of our fee schedule. *See* 47 C.F.R. § 1.1102(14).

5. Finder's Preference Processing Procedures

a. Factual information on review

66. *Proposal.* The *Notice* states that the finder must submit sufficient information to establish a *prima facie* violation of our Rules. 5 FCC Rcd 6404. If the preference letter does not establish such a *prima facie* violation, then under our prosecutorial discretion, the request for preference would be dismissed without action.

67. *Comments.* NABER expresses concern that we have not established formal requirements for the contents of a finder's request, and suggests that we specify the necessary documentation in order to reduce the number of speculative requests. [109] AMI suggests that a target licensee should have 30 days to oppose the finder's request and have the right to appeal any adverse agency action. AASHTO recommends that the Commission hold a full administrative hearing before a target licensee's frequencies are released to the finder. [110]

68. *Decision.* We will require finders to submit sufficient information to establish a *prima facie* case against the licensee, but w e decline to specify the kinds of evidence that would satisfy this standard. We will not presume to label one type of evidence as inherently more reliable than another. Kinds of evidence that may prove useful include: affidavits, invoices, photographs, contracts, and correspondence. This list should not be viewed as exclusive or exhaustive. We also clarify that the burden of proof is on the finder to demonstrate that the target licensee has violated our rules. [111]

b. Preference award procedures

69. *Proposals.* We proposed that if a violation results in the recovery of frequencies, we would issue a letter "awarding a preference" to the finder. At that time, the prospective applicant would be advised to follow the applicable frequency coordination procedures, if any. The subsequent application, along with our letter awarding the preference, would be required to be submitted to the appropriate coordinator within 30 days of the date of the letter. Should that not be done or should the application filed with the Commission be dismissed as defective, the applicant would lose its preference and the assignment of the recovered channel would be made through our normal "first-come, first-served" assignment procedures. *Notice,* 5 FCC Rcd at 6404.

70. We also proposed to apply a lottery procedure in the event that we receive two or more letters on the same day making the same assertions against the same target licensee. *Notice,* 5 FCC Rcd at 6404-5. In the case of a finder's preference, the class of eligible applicants would be limited to the first finder(s) who submit a preference request letter that initiates a Commission investigation. Following our first-come, first-served policy, we proposed to consider as mutually exclusive only those letters of complaint that (1) meet the specific content requirements as outlined in this *Report and Order* and (2) are filed with the Compliance Branch on the same day, whether that day is the first day on which such acceptable filings may be submitted or whether it is a subsequent day thereafter.[112]

71. *Comments.* Those commenting on our mechanism for issuing a preference letter support our proposal. Regarding the handling of mutually exclusive finder's preference requests, SIRSA supports the lottery as the most effective and efficient means of selecting new licenses from multiple same-day filed preference requests. [113]

72. *Decision.* We adopt our proposal with certain modifications. Successful finder[114] will be issued a letter awarding a preference and will have 90 days from the date of the letter to submit an acceptable FCC applications [115] for the channels in question to either the Commission or a frequency coordinator, as appropriate. If the finder intends to operate at the same site location and within the same operational parameters as the target licensee, the finder must submit the letter together with its application directly to the Commission's Licensing Division. t [116] Under such circumstances, the finder's license application is analogous, for frequency coordination purposes, to a li-

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[108] *See* Section 1.1102(14), 47 C. F. R § 1.1102(14), for additional information regarding the filing of finder's preference requests.

[109] Comments of NABER at 11-12.

[110] Comments of AMI at 7-8; AASHTO at 3.

[111] As with any enforcement action, the target licensee will have adequate opportunity to respond to allegations. *See* 47 C.F.R. § 1.45 and para. 55, *supra*. We decline, however, to mandate trial-type administrative hearings for each finder's request.

[112] *Notice,* 5 FCC Rcd at 6404-5. *See also* 47 C.F.R. § 90.143(b).

[113] Comments of SIRSA at 19. *See also* comments of UTC at 16.

[114] A successful finder is one that has provided the necessary information and evidence leading to the recovery of a channel(s) and has filed a request on the first day that a request is accepted regarding a particular licensee -- whether that day is the first day on which filings may be submitted for the channel(s) in question or whether it is a subsequent day thereafter.

[115] The 90-day period is designed to give the applicant that initially files an *unacceptable* application sufficient time to make necessary corrections and file an acceptable application. It is recommended that in order to ensure that an acceptable application is forwarded to the FCC within the 90-day time limit, that the applicant submit all required information either to the FCC or, where applicable, the appropriate frequency coordinator well in advance of this deadline.

[116] These applications require fees but do not require frequency coordination. Accordingly, the applicant should refer to Section 0.401(b)(4) of our Rules, 47 C.F.R. § 0.401(b)(4) to determine the correct address for submission of applications.

cense renewal. When a licensee renews its license without modification to facilities, we do not require frequency coordination. A finder that thus essentially "steps into the shoes" of the target licensee should not require new coordination. A finder seeking to utilize the target licensee's frequencies at a *different* location or with facilities different from those authorized must submit the letter together with the appropriate FCC application to the frequency coordinator. If the finder does not timely file the application or if a defective application is not corrected within the required 90-day period, the finder will lose the preference. [117]

c. Potential for Abuse

73 *Proposal.* In our efforts to encourage industry participation in monitoring the use of the private radio spectrum, we also recognized the potential for abuse of Commission processes. For example, a potential finder may harass competitors with false complaints or make unsubstantiated allegations against all licensees in a particular market in the hope that one of the allegations will prove correct. 5 FCC Rcd at 6405. We emphasized our commitment to take appropriate action against any finder or licensee who abuses the rules and processes of the Commission.

74. *Comments.* Several commenters urge strong enforcement against finders who engage in harassing and abusive practices. [118] For example, AMI asks the Commission to implement strong safeguards against unfounded, speculative, or abusive finder's preference requests. AMI further suggests that finder's preference applicants should agree that they will compensate target licensees for all reasonable expenses in defending their licenses, even if the finder's request does not result in a channel recovery. [119]

75. *Discussion.* Throughout this proceeding, we have incorporated precautionary measures into the finder's preference program to reduce the likelihood of abusive practices and to increase our ability to enforce such misconduct. For example, we require that finders must submit their preference request in the form of a sworn statement or declaration. *See* para. 55, *supra.* We also will require finders alleging violations of our construction rules to certify that the finder has not or will not compensate, in any way, a licensee of an unconstructed station. *See* para. 56, *supra.* [120] Despite these and other procedures that may reduce exploitation of the finder's preference, we recognize that we may receive filings that are made in bad faith. We agree that a finder intentionally submitting false requests must be dealt with severely. [121]

76. We will view any abuse of our processes seriously and will take appropriate action against any "finder" that engages in such conduct. All Commission licensees and permittees are required to be truthful and candid in their dealings with the Commission. *See* 47 U.S.C. § 312(a)(1). To clarify that *all* parties before the Commission must be truthful in their dealings with the agency, we recently amended Part 1 of our Rules to provide that: "No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." [122] Under our rules, willful false statements made in either applications, amendments, or related statements of fact are punishable by fine and imprisonment under Title 18 of the U.S. Code (18 U.S.C. § 1001), and by appropriate administrative sanctions, including license revocation or forfeiture. *See* 47 U.S.C. §§ 312(a), 503. We will not hesitate to enforce these sanctions against any applicant or licensee that misuses finder's preference in the ways described. We also will consider revocation of any licenses held by a finder's preference applicant found to have abused our processes. [123]

CONCLUSION

77. We are modifying our rules and policies on station construction, continuance of station operations, and license renewal and reinstatement. This action will help to clarify a number of licensing issues and will enhance the implementation of our licensing processes. We also adopt a finder's preference program to establish new incentives for persons to provide us information about unconstructed, non-operational, or discontinued private land mobile radio systems operating on exclusive channels. Through this program, we will enhance spectrum efficiency by identifying more unused channels and reassigning them to persons who will use them effectively.

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[117] If the coordinator cannot, for any reason, successfully coordinate the finder's preference application, the coordinator shall return the application to the finder, notify the Commission that the application has been returned, and provide an explanation as to why the application could not be successfully coordinated. The frequencies in question are not, at that time, available for reassignment by the coordinator. Only after the target license has been officially deleted from our database may the coordinator recommend reassignment to anyone other than the applicant granted the finder's preference.

[118] *See* Comments of AMI at 3; ASNA at 6; Motorola at 9; NABER at 12.

[119] Comments of AMI at 11.

[120] We decline to implement AMI's suggestion regarding compensation for target licensees' reasonable expenses because this will not assist us in achieving the goals of the finder's preference program. Compensation will not be available to either the finder or the target licensee.

[121] The Commission has long considered the filing of "strike applications" to be a serious matter requiring strong sanctions. *See* Memorandum Opinion and Order, 69 FCC 2d 1139, *recon. denied,* 72 FCC 2d 264 (1979) (*Radio Carrollton*). A "strike application" generally involves an applicant who submits a license application for the purposes of delay or obstruction of our rules (such as harassing a competitor or extorting a settlement from the affected licensee). We consider the filing of "strike" finder's preference requests to constitute an abuse of our processes, and will deal with such violations accordingly.

[122] 47 C.F.R. § 1.17. This provision formerly appeared in Part 73 of our Rules. We decided to transfer it to Part 1 of our Rules in order to make clear that the obligation to be truthful and candid is equally binding in the nonbroadcast context. *See* Policy Statement and Order, 5 FCC Rcd 3252 (1990).

[123] For example, if a later investigation shows evidence of any direct compensation or indirect compensation (such as through the exchange of services) in violation of our "non-compensation" conditions (set forth in paragraph 56), we will initiate revocation proceedings.

FINAL REGULATORY FLEXIBILITY ANALYSIS

78. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

A. Need and purpose of this action

The Commission is adopting these rule changes to reassign expired licenses more efficiently, and to encourage the public to assist our channel recovery efforts. These actions will foster spectrum efficiency by identifying more channels that are not being used and by reassigning these channels to persons who will use them effectively. Certain rules have been clarified to reduce industry confusion regarding their interpretation.

B. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered

All significant alternatives have been addressed in this Report and Order.

ORDERING CLAUSES

79. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 332(a), that Parts 1 and 90 of the Commission's Rules, 47 C.F.R. Parts 1 and 90, ARE AMENDED as set forth in Appendix B below.

80. IT IS FURTHER ORDERED that these Rules, as amended, shall be effective [30 days after publication in the *Federal Register*].

81. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

82. For further information, contact Martin Liebman or Rosalind Allen, Private Radio Bureau, Land Mobile and Microwave Division, Rules Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

American Association of State Highway and Transportation Officials (AASHTO)

Advanced Mobilecomm Inc. (AMI)

American Mobile Systems (AMS)

American SMR Network Association Inc. (ASNA)

Associated Public-Safety Communications Officers, Inc. (APCO)

Blooston, Mordkofsky, Jackson & Dickens (Blooston Mordkofsky)

Celpage, Inc. (Celpage)

Council of Independent Communication Suppliers (CICS)

Dispatch Communications, Inc. (Discom)

Fleet Call, Inc. (Fleet Call)

Forest Industries Telecommunications (FIT)

International Municipal Signal Association and the International Association of Fire Chiefs, Inc. (IMSA/IAFC)

County of Los Angeles, California (County of Los Angeles)

Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC)

Mobile Radio Resources

State of Montana (Montana)

Motorola Inc. (Motorola)

National Association of Business and Educational Radio, Inc. (NABER)

City of Pasadena, Texas (City of Pasadena)

Palidor Radio Communications Consultants Ltd. (Palidor)

Parcco Communications and Electronics of PA, Inc. (Parcco)

City of San Diego, California (City of San Diego)

Special Industrial Radio Service Association, Inc. (SIRSA)

Utilities Telecommunications Council (UTC)

Reply Comments

American SMR Network Association Inc. (ASNA)

American Petroleum Institute (API)

Associated Public-Safety Communications Officers, Inc. (APCO)

Council of Independent Communication Suppliers (CICS)

Fleet Call, Inc. (Fleet Call)

Motorola Inc. (Motorola)

National Association of Business and Educational Radio, Inc. (NABER)

City of Pasadena, Texas (City of Pasadena)

Special Industrial Radio Service Association, Inc. (SIRSA)

Utilities Telecommunications Council (UTC)

APPENDIX B

A. 47 C.F.R. Part 1 is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. § 1.926 is amended by adding a new paragraph (c) to read as follows:

§ 1.926 Application for renewal of license.

* * * * *

(c) Reinstatement of an expired license in the Private Land Mobile Radio Services may be requested up to thirty (30) days after the expiration date using FCC Form 574, 574-R or 405-A. See § 1.4 of this chapter.

3. 47 C.F.R § 1.1102 is amended by adding a new paragraph (14) accompanied by a new Note C to read as follows:

§ 1.1102 Schedule of charges for private radio services.

Action	FCC Form No.	Fee amount	Fee Type Code	Address
14. Finder's Preference Requests (see Note C below)	Corresp. FCC 155	105	PDX	Federal Communications Commission, Feeable Correspondence, P.O. Box 358305 Pittsburgh, PA 15251-5305.

* * * * *

Notes: * * * C. The fee for a Finder's Preference Request is $105 per channel.

B. 47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.119 is amended by adding new paragraph (a)(5) and by revising paragraphs (e)(1) and (h) to read as follows:

§ 90.119 Application forms.

(a) * * *

(5) For reinstatement of an expired license. See also paragraphs (e)(1) and (h) of this section.

* * * * *

(e) * * *

(1) Apply for license renewal (if the reinstatement or renewal does not involve the modification of the station or system license) when the licensee has not received renewal Form 574-R in the mail from the Commission within sixty (60) days of license expiration, and may be used to apply for reinstatement of an expired license (if the reinstatement does not involve the modification of the station or system license).

* * * * *

(h) Form 574-R shall be used to apply for a renewal of an existing authorization and may be used to apply for reinstatement of an expired license, if the renewal or reinstatement does not involve the modification of the station or system license. (Form 574-R is generated by the Commission and is mailed to the licensee prior to the expiration of the license term).

3. 47 C.F.R. § 90.127 is amended by adding a last sentence to paragraph (b) to read as follows:

§ 90.127 Submission and filing of applications.

* * * * *

(b) * * * Applications for license reinstatement must be filed no later than thirty (30) days after the expiration date of the license. See § 1.4 of this chapter.

* * * * *

4. 47 C.F.R. § 90.149 is amended by revising paragraph (a), by redesignating paragraph (b) as paragraph (c), and by adding a new paragraph (b), to read as follows:

§ 90.149 License term.

(a) Licenses for stations authorized under this part will be issued for a term not to exceed five years from the date of the original issuance, modification or renewal, provided however that licensees have an additional thirty (30) days to apply for reinstatement of expired licenses.

(b) If no application for reinstatement has been filed as specified in this Part, the authorization shall be deemed to have automatically cancelled on the date specified on the authorization.

* * * * *

5. 47 C.F.R. § 90.155 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraph (b) of this section and in §§ 90.629 and 90.631(f), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

(c) For purposes of this section, a base station is not considered to be placed in operation unless at least one associated mobile station is also placed in operation. See also §§ 90.633(d) and 90.631(f).

6. 47 C.F.R. § 90.157 is amended by revising paragraph (a), by removing paragraph (b) and by redesignating paragraph (c) as new paragraph (b) to read as follows:

§ 90.157 Discontinuance of station operation.

(a) The license for a station shall cancel automatically upon permanent discontinuance of operations and the licensee shall forward the station license to the Commission. Alternatively, the licensee may notify the Commission of the discontinuance of operations of a station by checking the appropriate box on Form 574-R or Form 405-A and requesting license cancellation. Notification of discontinued operation or cancellation shall be sent to: Federal Communications Commission, Gettysburg, PA 17326.

* * * * *

7. 47 C.F.R. § 90.173 is amended by adding a new paragraph (k) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) Notwithstanding any other provisions of this Part, any eligible person may seek a dispositive preference for an exclusive channel assignment in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands by submitting information that ultimately leads to the recovery of frequencies in these bands. Recovery of such frequencies will come about as a result of information provided regarding the failure of existing licensees to comply with various provisions of Sections 90.155, 90.157, 90.629, 90.631(e) or (f), or 90.633(c) or (d) of this Part. Preferences will not apply to instances where the targeted channels are those encompassed by the National Plan for Public Safety (the 821-824/866-869 MHz channels) or any Regional Public Safety Plans -- unless the requested preference is accompanied by a written statement from the relevant Regional Public Safety Planning Committee indicating that the request is not

inconsistent with the Region's Public Safety Plan. The dispositive preference provided for in this subsection also may be awarded to any person who arranges for an existing licensee to voluntarily request license cancellation because the licensee anticipates that it will be unable to timely construct and place its licensed facilities in operation. See §§ 90.155, 90.629, 90.631(e) and (f), 90.633(c) and (d). In the instance of such consensual preferences, both finder and licensee must certify that they have neither given nor received any direct or indirect compensation in connection with the requested license cancellation, and the finder will assume the former licensee's deadline for constructing and placing the licensed facility in operation.

(1) Eligibility for preference - The recipient of a finder's preference must be eligible to be a licensee in the private land mobile services and eligible to be licensed for the channels targeted by the finder's request on either a primary basis or through intercategory sharing -- except a finder's preference for occupied channels in the 800 MHz Public Safety Category shall only be available to Public Safety Category eligibles.

(2) Timeliness of finder's request - A preference based on a construction or placed-in-operation violation will not be acceptable for filing until 180 days after the construction deadline of the target licensee. The preference shall not apply to any case scheduled for regular review during the Private Radio Bureau's normal compliance activities or to any case under Commission review or investigation. An applicant that files a timely request for a finder's preference that results in channel recovery, and that also timely submits an application in a form acceptable for filing, will receive a dispositive preference for the recovered channel(s). Where more than one applicant obtains a preference for the same channel(s), we will grant the license to operate on the channel(s) to one of these applicants through our random selection procedures. See § 1.972 of this chapter.

(3) Contents of request - The finder's preference request shall be mailed to the following address: Federal Communications Commission, Feeable Correspondence, P.O. Box 358305, Pittsburgh, PA 15251-5305. See § 1.1102(14) of this chapter. The request shall contain detailed information to establish a prima facie violation, including: the name and address of the licensee allegedly violating the applicable rules; the licensee's call sign, frequencies and location of the licensed facility; the Commission Rule(s) that the licensee is allegedly violating, including the dates or benchmarks the licensee has failed to meet; and a detailed statement as to the specific basis for the applicant's knowledge that the licensee is violating the rules specified in this section. General and conclusory statements shall result in the summary dismissal of any such request. All preference requests shall be in the form of a sworn affidavit or a declaration dated and subscribed by the person as true under penalty of perjury as set forth in § 1.16 of this chapter. All preference requests shall certify that a complete copy of the preference request has been served on the target licensee. See § 1.47 of this chapter.

8. 47 C.F.R. § 90.175 is amended by revising the introductory paragraph and by adding a new paragraph (f)(15) to read as follows:

§ 90.175 Frequency coordination requirements.

Except for applications listed in paragraph (f) of this section, each application for a new frequency assignment, for a change in existing facilities as listed in § 90.135(a), or for operation at temporary locations in accordance with § 90.137, must include a showing of frequency coordination as set forth below. An application to reinstate a license expired for more than thirty (30) days will be considered as a request for a new frequency assignment. When frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators.

* * * * *

(f)(15) Applications timely-filed by recipients of a finder's preference, where the applicant intends to operate at the same site location, and with the same technical parameters as the prior licensee.

9. 47 C.F.R. § 90.611 is amended by revising paragraph (d) to read as follows:

§ 90.611 Processing of applications.

* * * * *

(d) Applications for channels in the SMR category that cannot be granted due to a lack of available channels in a particular area will be placed on a waiting list for that area. Waiting lists will consist of two groups. The first group will be comprised of applications from existing licensees who, in the area corresponding to the particular waiting list, operate trunked systems with 70 or more mobile units per channel. The second group will be comprised of applications to establish new systems or to obtain additional channels for conventional systems. Applications will be placed in the appropriate group according to filing dates, with the earliest date receiving the highest ranking. All applications in the first group will receive priority over any application in the second group regardless of filing date. When channels become available as a result of either the Commission's compliance activities, a licensee's voluntary and independent request for license cancellation, or failure by the recipient of a finder's preference to timely submit an application in a form acceptable for filing, the highest ranking application(s) will be granted based on the site specified and the Commission's mileage separation standards. An applicant filing a timely request for a finder's preference that results in the recovery of SMR category channels, and that also timely submits an application in a form acceptable for filing, will receive a dispositive preference for those channels over the highest ranking application(s). Where more than one applicant obtains a preference for the same channel(s), we will grant the license to operate on the channel(s) to one of these applicants through our random selection procedures. See § 1.972 of this chapter. Trunked systems that have had authorized channels cancelled due to failure to meet the loading requirements in § 90.631 will not be permitted on the waiting list for a period of six months from the date of the issuance of

the superseding license.

10. 47 C.F.R. § 90.631 is amended by adding a last sentence to paragraph (f) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(f) * * * For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation.

* * * * *

11. 47 C.F.R. § 90.633 is amended by revising paragraph (d) to read as follows:

§ 90.633 Conventional systems loading requirements.

* * * * *

(d) If a station is not placed in operation in eight months, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be place in operation unless at least one associated mobile station is also placed in operation.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 6, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Valley Answering Service - Request for refund of filing fees for additional facilities on Frequency 931.7625 MHz at Portland - **Denied** (November 5, 1991).

Country Investments Limited Partnership - Petition for Reconsideration of request for a refund of a hearing fee for a new station at Idaho Falls, Idaho - **Denied** (November 5, 1991).

Caren Lacy - Request for refund of a hearing fee for a new FM broadcast station at Durango, Colorado - **Granted** (November 5, 1991).

WSRE-TV Foundation, Inc. - Request for refund of filing fee for a transportable Ku-band transmit-only earth station and determination of exemption from fee requirements - **Granted** (November 5, 1991).

Mark A. Kilmer - Request for refund of a hearing fee for a new FM broadcast station on Channel 235C2 at Hillman, Michigan - **Granted** (November 5, 1991).

Sam Widge Advertising Limited Partnership - Request for deferral of a hearing fee for a new FM station at Wallace, Idaho - **Granted** (November 5, 1991).

Boys Scouts of America, Radio Explorers Post 1400 - Request for waiver of filing fee for Restricted Radio Telephone Operator Permit - **Denied** (November 5, 1991).

Nancy C. Hier - Request for refund of a hearing fee for a new FM broadcast station on Channel 235C2 at Hillman, Michigan - **Granted** (November 15, 1991).

Willis Broadcasting Corporation - Request for a refund of a hearing fee for renewal of a license for an AM station at East Point, Georgia - **Granted** (November 5, 1991).

Radiovision Cristiana Management Corporation - Request for refund of filing fee for license renewal and annual ownership report for station WWRV-AM, New York, New York - **Granted** (November 5, 1991).

United States Coast Guard Auxiliary - Request for determination of exemption from payment of filing fees - **Denied** (November 5, 1991).

Atlantic Radio Communications, Inc. - Request for refund of a hearing fee for a new FM broadcast station at Manahawkin, New Jersey - **Granted** (November 5, 1991).

WJCT, Inc. - Request for determination of exemption from payment of filing fees for MMDS Station WHT675, Jacksonville, Florida - **Granted** (November 25, 1991).

Volunteers in Technical Assistance - Request for determination of exemption from payment of filing fees for authority to construct an international non-profit low-earth orbit satellite (LEO) system - **Denied** (November 25, 1991).

Sea Explorers Columbia Pacific Council - Request for waiver of filing fee for inspection of marine VHF radio (WSP 5896) - **Denied** (November 25, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 1991

Richard D. Rubino, Esquire
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Washington, D.C. 20037

Re: Applications for Additional Facilities Portland (2 sites), Salem, Eugene, Westport, Wilsonville, Albany and Newport, Oregon, and Seattle, Washington
File No. 22940-CD-P/ML-01-91

Dear Mr. Rubino:

This is in response to your request for refund of the filing fees that Barbara J. and Clifford D. Moeller, d/b/a Valley Answering Service (Valley), submitted in connection with the above-captioned applications.

You state that the Mobile Services Division returned the applications because their proposed maximum effective power exceeded the maximum power permitted by the Commission's rules. Valley refiled its applications in compliance with the staff's instructions, but you contend that Valley is entitled to a refund of its initial filing fee because the rules do not make clear that Valley's earlier proposed power exceeded the permissible maximum.

Our review of this matter discloses no basis for a grant of the refunds that you request. In establishing its fee program, the Commission declared that a refund would be afforded only in the limited instances enumerated in section 1.1111 of the rules, 47 C.F.R. § 1.1111. See Fee Collection Program, 2 FCC Rcd 947, 949 (1987). Section 1.1111 contains no exception to the prohibition on refunds due to the particular disposition of an application. Rather, the Commission has explicitly rejected the issuance of a refund based upon an application's disposition. Id. An applicant aggrieved because of an alleged ambiguity in the rules should timely file a petition for reconsideration pursuant to section 1.106 of the rules, 47 C.F.R. § 1.106.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 - 1991

Stephen Diaz Gavin, Esquire
Besozzi & Gavin
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Mr. Gavin:

This is in response to your Petition for Reconsideration of the Managing Director's denial of your request for a refund of the hearing fee paid by Country Investments Limited Partnership (Country) in connection with its application for a new station at Idaho Falls, Idaho. See Letter to Stephen Diaz Gavin, Esq. from the Managing Director, dated August 30, 1991. The Managing Director denied your request because Country failed to file its settlement agreement with the sole remaining competing applicant in a timely fashion.

You state that Country and a competing applicant timely filed Notices of Appearance and the requisite hearing fees. In its Notice, Country informed the presiding Administrative Law Judge that "the parties expect to enter into a definitive settlement agreement, which the parties will shortly file with the Presiding Judge." The Notice also advised that Country would request a refund of its fee payment upon approval of the forthcoming settlement agreement. Shortly thereafter, the parties filed a settlement agreement which, inter alia, provided that Country would withdraw from the proceeding. Upon approval of the agreement, Country filed its request for refund of the fee payment.

The Managing Director denied Country's refund request because Country had failed to file the agreement by the Notice of Appearance deadline. In its Petition for Reconsideration, Country argues that a refund is warranted because it filed its Notice "solely for the purpose of its settlement agreement...since Country risked the dismissal of its application without the approval of the settlement [agreement] had it not filed its fee along with its Notice of Appearance." Moreover, Country states that it informed the Managing Director that its Notice informed the presiding ALJ that it had reached a settlement with the only other applicant in the proceeding. Consequently, retention of the fee is unwarranted because the presiding ALJ had only to dispose of the proposed settlement agreement and, with favorable action on the agreement, could dismiss Country's application without any further expenditure of resources.

In addition, in Country's view, the Commission should not impose a hearing fee on a serious applicant, such as Country, which withdraws in good faith from a proceeding after weighing the comparative merits of its application, but should limit the use of its hearing fee to "'weed out non-serious applicants.'" See Report and Order on the Reform of the Comparative Hearing Process, 6 FCC Rcd 157 at ¶ 5. (1990). Rather, Country argues that the Commission would discourage future applicants from entering settlement agreements if it imposes the hearing fee even on a withdrawing applicant which informs the presiding ALJ in its Notice that a settlement agreement with the remaining parties in the proceeding will be filed in the near future.

Refunds of hearing fees after an application has been designated for hearing are governed by section 1.1111 of the Commission's rules. See 47 C.F.R. § 1.1111. Section 1.1111(c)(1) provides an exception to the fee requirement "[w]hen a settlement agreement filed with the presiding judge by the Notice of Appearance deadline ... provides for the dismissal of all but one of the applicants ...." In the instant case, Country's settlement agreement was not filed until after the Notice of Appearance deadline. Rather, only an assurance that a settlement agreement would be filed in the future accompanied the Notice. Thus, we cannot find that Country complied with the plain and unambiguous language of the rule that settlement agreements are to be filed by the time for the filing of Notices in order for the applicant to obtain a refund. See Fees I, 2 Fcc Rcd 947, 966 (1987).

Moreover, the Commission addressed and rejected the broad arguments that you raise concerning its policies to encourage settlement agreements through refund of the hearing fee. See Report and Order on the Reform of the Comparative Hearing Process at 156-159. Thus, while the Commission does indeed view the hearing fee requirement as a vehicle to "weed out' all but serious applicants, the Commission has also stated that the fee requirement serves an incentive to encourage settlement by permitting applicants to avoid the fee requirement if the agreement is filed by the time the hearing fee must be paid. Id. at 157-158. Any differences Country may have concerning the mechanics of the Commission's policy should have been brought to the Commission's attention within the time allowed for the filing of petitions for reconsideration of that policy. Denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 02/04/91
GENERAL ARGUMENT QUERY

Fee Control Number: [9101318170198001]
Applicant's Name: [COUNTRY INVESTMENTS LTD PARTNERSHIP]
Correspondence Address (Line 1): [6192 WINSTEAD PL]
Correspondence Address (Line 2): [ ]
City: [BOISE] State/Country : [ID] ZIP Code: [837040000]
Call Sign: [BPH890412M] Data Changed Flag: [N]

(1) Fee Type Code:	MWR	Fee Multiple:	0001	Fee Due:	$6760.00
(2) Fee Type Code:		Fee Multiple:	0000	Fee Due:	$0.00
(3) Fee Type Code:		Fee Multiple:	0000	Fee Due:	$0.00
(4) Fee Type Code:		Fee Multiple:	0000	Fee Due:	$0.00
(5) Fee Type Code:		Fee Multiple:	0000	Fee Due:	$0.00

Total Amount Remitted: $ 6760.00 Overage Amount: $ 0.00
Current Amount: $ 6760.00 Check Flag:

Press S for next screen

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5. 1991

Ms. Caren Lacy
247 Pine Ridge Loop
Durango, Colorado 81301

Dear Ms. Lacy:

This is in response to your request for a refund of the hearing fee that you filed in connection with your application for a new FM broadcast station at Durango, Colorado.

Notices of Appearance in the proceeding to select a licensee for the station at Durango were due July 15, 1991. However, only you filed the Notice in a timely matter. Therefore, you are entitled to a refund of your hearing fee since section 1.1112(c) provides for refund of the fee when only one applicant timely files its Notice of Appearance.

We note that on June 17, 1991, Four Corners Communications Company, Ltd., licensee of FM station KIOX, Durango, Colorado, filed a petition to deny against your application. If the issues raised by Four Corners cause your application to be subsequently set for hearing, or if your application is set for hearing for any other reason, you will be subject to a hearing fee payment. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 965-966 (1987).

Accordingly, your request is granted. A check, made payable to you in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any question about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 08/13/91
GENERAL ARGUMENT QUERY

Fee Control Number: [9107178170290002]
Applicant's Name: [LACY, CAREN]
Correspondence Address (Line 1): [247 PINE RIDGE LOOP]
Correspondence Address (Line 2): [ ]
City: [DURANGO] State/Country : [CO] ZIP Code: [813010000]
Call Sign: [910227MG] Data Changed Flag: [N]

(1) Fee Type Code: MWR Fee Multiple: 0001 Fee Due: $6760.00
(2) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(3) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(4) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(5) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
Total Amount Remitted: $ 6760.00 Overage Amount: $ 0.00
Current Amount: $ 6760.00 Check Flag:

Waiver: Status: Refund: Payment:
Press S for next screen

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 - 1991

Margaret L. Miller, Esquire
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037

Dear Ms. Miller:

This is in response to your request for a refund of the fee paid by the WSRE-TV Foundation, Inc. (Foundation) in connection with its application for a transportable Ku-band transmit-only earth station and for a determination that the Foundation is exempt from the fee requirement.

You state that the Foundation is a non-profit corporation organized to support WSRE-TV, a noncommercial educational broadcast station, licensed to the Pensacola Junior College District Board of Trustees. The Foundation was organized under the laws of the State of Florida and is exempt from the payment of federal income taxes. The Foundation's Articles of Incorporation state that the Foundation exists only to assist WSRE-TV's operations by "rais[ing] funds for and otherwise support[ing] the activities, operations and capital needs of noncommercial educational station WSRE-TV." In that capacity, the Foundation filed for authority to construct and operate a transportable transmit only Ku-band earth station. The facility will be used (1) to assist in the production of television programming covering events in the WSRE-TV coverage area and (2) to support WSRE-TV financially by leasing out any excess capacity and using or donating any revenue to support the operations and capital requirements of WSRE-TV. Allan A. Pizzato, Executive Director of the Foundation and General Manager of WSRE-TV, has submitted a Declaration attesting to the truth of the foregoing facts.

You contend that the Foundation is entitled to an exemption from the fee requirement because its operation of radio facilities is intended to directly support the programming activities of a noncommercial educational broadcast station in exactly the same manner as if the station itself held the license to the Foundation's proposed facilities.

We find that the Foundation is entitled to waiver of the fee requirement. Under section 8 of the Communications Act, as amended, WSRE-TV is exempt from application and other filing fees due to its status as a noncommercial station. See 47 U.S.C. 158.

The Foundation exists solely to support WSRE-TV and the Foundation has represented that the activities of the proposed earth station, both financially and operationally, are, and will be, explicitly and exclusively, dedicated to the benefit of WSRE-TV. In essence, the activities of the Foundation generally and, more specifically, with regard to the earth station are tantamount to those of a noncommercial educational broadcast station, statutorily exempt from the fee requirement. Thus, while we are mindful that the Commission's discretion to waive a fee requirement is narrow, we are satisfied that an exemption from the fee requirement is justified in this instance since the facility for all practical purposes will be operated as an adjunct of an entity exempt by statute from the fee requirement. Accordingly, your request is granted.

A check, in the amount of $1,525.00 and drawn in the name of the WSRE-TV Foundation, will be sent to you at the earliest practicable time. If you have any questions regarding this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 05/21/90

APPLICANT QUERY SCREEN

Fee Control Number: [9107058160451001]
Applicant Name: [WSRE TV FOUNDATION INC]
Correspondence Address (Line 1): [M MILLER]
Correspondence Address (Line 2): [1255 TWENTY THIRD STREET NW STE]
City: [WASHINGTON] State/Country: [DC] ZIP code: [200370000]
Call Sign: [ ] (Data Changed Flag: [N])

(1) Fee Type Code: BAX Fee Multiple: 1 Fee Due: $1525.00
(2) Fee Type Code: Fee Multiple: 0 Fee Due: $0.00
(3) Fee Type Code: Fee Multiple: 0 Fee Due: $0.00
(4) Fee Type Code: Fee Multiple: 0 Fee Due: $0.00
(5) Fee Type Code: Fee Multiple: 0 Fee Due: $0.00
Overage Amount: $0.00 Total Amount Remitted: $1525.00
Check Flag: Current Amount: $1525.00
Waiver: Status: Refund: Payment:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 1991

Julian P. Freret, Esquire
Booth, Freret & Imlay
Suite 150
1920 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Freret:

This is in response to your request for a refund of the hearing fee submitted on behalf of Mark A. Kilmer (Kilmer), the applicant for a new FM broadcast station on Channel 235C2 at Hillman, Michigan.

You state that on July 15, 1991, Kilmer timely filed its Notice of Appearance and fee payment of $6,760 in connection with a comparative hearing for a new commercial FM station on Channel 235C2 at Hillman, Michigan. This proceeding was designated for hearing by Hearing Designation Order, DA 91-808, released on July 22, 1991. On July 30, 1991, Kilmer entered into a separate settlement agreement with the other remaining mutually exclusive applicant for the Hillman station, Nancy C. Hier (Hier). On July 31, 1991, Kilmer and Hier timely filed a joint request for approval of this settlement agreement as required under section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525. The Commission subsequently granted the joint request for approval of the settlement agreement. See Memorandum Opinion and Order, FCC 91-200, released August 21,1991.

In the instant case, the settlement agreement between Kilmer and the remaining mutually exclusive applicant, Hier, obviates the need for a comparative hearing. See 47 C.F.R. § 1.1111(c)(1).

Accordingly, a refund of the hearing fee is warranted. See Memorandum Opinion and Order, 6 FCC Rcd 3403 (1991). A check in the amount of $6,760.00, payable to Mark A. Kilmer, will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 05/21/90

APPLICANT QUERY SCREEN

Fee Control Number: [9107158170285024]
Applicant Name: [KILMER, MARK A]
Correspondence Address (Line 1): [3964 E LAWRENCE DR]
Correspondence Address (Line 2): [ ]
City: [OSCODA] State/Country: [MI] ZIP code: [487500000]
Call Sign: [900118MN] (Data Changed Flag: [N])

(1) Fee Type Code:	MWR	Fee Multiple:	1	Fee Due:	$6760.00
(2) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(3) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(4) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(5) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00

Overage Amount: $0.00 Total Amount Remitted: $6760.00
Check Flag: Current Amount: $6760.00
Waiver: Status: Refund: Payment:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 . 1991

Benito Gaguine, Esquire
Reddy, Begley & Martin
2033 M Street, N.W.
Suite 500
Washington, D.C. 20036

Dear Mr. Gaguine:

The Review Board has referred to this Office for consideration your request to defer the submission of a hearing fee by Sam Widge Advertising Limited Partnership (Sam Widge), applicant for a new FM station at Wallace, Idaho. See Sam Widge Advertising Limited Partnership, MM Docket No. 91-20, adopted August 21, 1991.

You filed your request for deferral concurrently with Widge's Notice of Appearance and a settlement agreement entered between Sam Widge and the single competing application designated for hearing. Under the terms of the settlement agreement, subject to the approval of the presiding Administrative Law Judge, the competing applicant would withdraw from the proceeding and Sam Widge, as the sole remaining applicant, would be granted the station license.

You state that no hearing fee was due because the rules do not impose a hearing fee when the parties designated for a comparative proceeding enter a settlement agreement and the surviving application is "immediately grantable." See 47 C.F.R. § 1.1111(c)(1). You further argue that Sam Widge's application was ready for immediate grant at the time the Notices of Appearance were due, notwithstanding the inclusion in the proceeding's Hearing Designation Order (HDO) of directives that Widge submit an environmental amendment and an EEO amendment. You contend that these amendments are minor in nature and their disposition would cause no disruption or delay in the selection of the licensee for the Wallace station. Finally, you state that a grant of the requested deferral entails no risk of subsequent noncompliance with the fee requirements since the Commission's rules condition license authorizations upon the final payment of applicable fees. 47 C.F.R. § 1.1110.

In a recent decision, the Commission considered whether to permit the refund of a hearing fee in circumstances in which the sole

surviving applicant in a comparative broadcast proceeding must resolve an outstanding issue or directive. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), reconsidered in part, FCC 91-298, released October 10, 1991. Therein, the Commission concluded that it would not require the payment of a hearing fee where the sole surviving applicant was only required to satisfy a directive (as opposed to an issue) specified in the designation order. See Id. ¶48.

Accordingly, your request for deferral is granted and no hearing fee is due. We are aware that Sam Widge has entered a settlement agreement with Suzanne N. Wilson, an applicant dismissed prior to issuance of the designation order in this proceeding for failure to file an original signature with her application. See Petition for Reconsideration filed by Suzanne N. Wilson on September 3, 1991. Under the terms of the settlement agreement, Sam Widge's application will be dismissed and Ms. Wilson will become the licensee at Wallace. If the applications of Ms. Wilson and Sam Widge should later be subject to a comparative hearing, a hearing fee may be due from each of these parties.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 - 1991

Richard J. Hayes, Jr., Esquire
Attorney at Law
1359 Black Meadow Road
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This is in response to your request for a refund of the hearing fee that you submitted on behalf of Nancy C. Hier (Hier), the applicant for a new FM broadcast station on Channel 235C2 at Hillman, Michigan.

You state that on July 15, 1991 Hier timely filed a Notice of Appearance and fee payment of $6,760 in connection with a comparative hearing for a new commercial FM station on Channel 235C2 at Hillman, Michigan. This proceeding was designated for hearing by Hearing Designation Order, DA 91-808, released on July 22, 1991. On July 30, 1991, Hier entered into a separate settlement agreement with Mark A. Kilmer (Kilmer), the only other mutually exclusive applicant for the Hillman station. On July 31, 1991, Kilmer and Hier timely filed a joint request for approval of this settlement agreement as required under section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525. The Commission subsequently granted the joint request for approval of the settlement agreement. See Memorandum Opinion and Order, FCC 91-200, released August 21, 1991.

In the instant case, the settlement agreement between Hier and the remaining mutually exclusive applicant, Kilmer, obviates the need for a comparative hearing. See 47 C.F.R. § 1.1111(c)(1).

Accordingly, a refund of the hearing fee is warranted. See Memorandum Opinion and Order, 6 FCC Rcd 3403 (1991). A check in the amount of $6,760.00, payable to Richard J. Hayes, Jr., Counsel to Nancy C. Hier, will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 08/13/91
GENERAL ARGUMENT QUERY

Fee Control Number: [9107158170285010]
Applicant's Name: [HIER, NANCY C]
Correspondence Address (Line 1): [RICHARD J HAYES JR ESQUIRE]
Correspondence Address (Line 2): [13809 BLACKMEADOW RD]
City: [SPOTSYLVANIA] State/Country : [VA] ZIP Code: [225530000]
Call Sign: [900116MU] Data Changed Flag: [N]

(1) Fee Type Code: MWR Fee Multiple: 0001 Fee Due: $6760.00
(2) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(3) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(4) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(5) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
Total Amount Remitted: $ 6760.00 Overage Amount: $ 0.00
Current Amount: $ 6760.00 Check Flag:

Waiver: Status: Refund: Payment:
Press S for next screen

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 - 1991

David M. Hunsaker, Esquire
Putbrese, Hunsaker & Ruddy
McLean House, Suite 100
P.O. Box 539
McLean, Virginia 22101

Dear Mr. Hunsaker:

This is in response to your request for a refund of the hearing fee that you submitted on behalf of Willis Broadcasting Corporation (WBC), applicant for renewal of license of AM station WTJH on 1260 kHz at East Point, Georgia.

On March 6, 1991, Steven J. Newman (Newman) filed a mutually exclusive application for authority to construct a new AM broadcast station at East Point, Georgia. The matter was designated for consolidated hearing by Hearing Designation Order, DA 91-462, released May 15, 1991. You state that on June 4, 1991, only WBC timely filed a Notice of Appearance and fee payment of $6,760 in connection with a comparative renewal hearing for a commercial AM station at East Point, Georgia. On June 12, 1991, Newman, filed a motion for voluntary dismissal of his mutually exclusive application, which was subsequently granted. See Order, FCC 91-2090, released July 11, 1991.

The dismissal of Newman's application obviates the need for a comparative hearing. See 47 C.F.R. § 1.1111(c)(2). Accordingly, a refund of the hearing fee is warranted. See Memorandum Opinion and Order, 6 FCC Rcd 3403 (1991). A check in the amount of $6,760.00, payable to Willis Broadcasting Corporation, will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 05/21/90
APPLICANT QUERY SCREEN

Fee Control Number: [9106068170267001]

Applicant Name: [WILLIS BROADCASTING CORPORATION]
Correspondence Address (Line 1): [PUTBRESE HUNSAKER & RUDDY]
Correspondence Address (Line 2): [6800 FLEETWOOD RD PO BOX 539]
City: [MC LEAN] State/Country: [VA] ZIP code: [221010000]
Call Sign: [ ] (Data Changed Flag: [N])

(1) Fee Type Code:	MWR	Fee Multiple:	1	Fee Due:	$6760.00
(2) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(3) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(4) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00
(5) Fee Type Code:		Fee Multiple:	0	Fee Due:	$0.00

Overage Amount: $0.00 Total Amount Remitted: $6760.00
Check Flag: Current Amount: $6760.00

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 1991

Mr. John S. Neely, Esquire
Miller & Fields, P.C.
Suite 760
1990 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Neely:

This is in response to your request for a refund of the filing fees submitted on behalf of Radio Vision Cristiana Management Corporation (Radio Vision), in connection with its application for license renewal and annual ownership report for the facilities of station WWRV-AM, New York, New York.

You state that Radio Vision submitted a $100 filing fee to the Commission on February 1, 1991, and a $35 fee on February 11, 1991, in connection with station WWRV's annual ownership report and license renewal application. According to your letter, Radio Vision is operating the station as a non-commercial educational facility in accordance with section 73.503 of the Commission's rules, exempt from application fee charges under section 1.1112(c) of the Commission's rules and thus is entitled to a refund. 47 C.F.R. §§ 73.503, 1.1112(c).

Although the applicant was not properly on record at the Commission as a noncommercial educational operation at the time of its application and license renewal request, you have since documented Radio Vision's noncommercial status by providing us with copies of Radio Vision's certificate of incorporation from the State of New York, as well as its Educational Purpose and Programming Statement and samples of program reports.

Accordingly, your request for a refund is granted. A check in the amount of $135.00, made payable to Radio Vision Cristiana Management Corporation will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 1991

Eugene M. Pester, Jr.
District Commodore
United States Coast Guard Auxiliary
Fifth Coast Guard District (NR)
512 Feaster Avenue
Feasterville, Pennsylvania 19050

Dear Commodore Pester:

This is in reference to your request for a determination of whether members of the United States Coast Guard Auxiliary should be exempt from payment of the Commission's application and other filing fees.

You state that members of the Coast Guard Auxiliary are entitled to an exemption from the fee requirement because the Auxiliary is an element of the United States Coast Guard, similar to the Regular Coast Guard and the Coast Guard Reserves. In this connection, you state that the Commandant of the Coast Guard determines the specific manner in which the Auxiliary assists in the performance of the Coast Guard's civil missions, prescribes the training and qualification standards of Auxiliary members and units, and regulates the Auxiliary's activities.

Section 8(d)(1) of the Communication Act provides that the Commission's fees are not applicable to governmental entities. Thus, the Auxiliary would be entitled to an exemption for any radio installed in a vessel it owns and which is licensed to it. However, ownership of a vessel by a member of the Auxiliary, even though the vessel is occasionally engaged in Auxiliary activities, would not qualify that individual for an exemption as a governmental entity due to the dual use of the vessel for purposes of the Auxiliary, as well as for pleasure or professional purposes. Moreover, your understanding that the Commission exempts members of the Civil Air Patrol from the fee requirement is mistaken.

Finally, you should be aware that the Commission may waive the fee requirement only in specific cases "where such action would promote the public interest." 47 U.S.C. § 158. The legislative history of that provision indicates that Congress intended that the Commission's authority to waive fees "shall be narrowly defined." Conference Report to accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 423 (1985). In view of Congress'

express limitation on the Commission's authority to grant fee waivers, we cannot find that an individual's membership in the Auxiliary warrants a waiver of a radio licensee's fee obligation.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. Richard J. Hayes, Jr.
Attorney at Law
1359 Black Meadow Road
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This is in response to your request for a refund of the hearing fee that you submitted on behalf of Atlantic Radio Communications, Inc. (Atlantic), the applicant for a new FM broadcast station on Channel 289B1 at Manahawkin, New Jersey.

You state that on July 30, 1991, before the issuance of a hearing designation order, Atlantic entered into a settlement agreement with Press Broadcasting, Inc. (Press), one of several mutually exclusive applicants for the Manahawkin station. On July 31, 1991, Press filed a joint request for approval of its settlement agreements with the remaining mutually exclusive applicants as required under section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525.

In the instant case, the Commission's approval of Press' request for approval of its omnibus settlement with the remaining mutually exclusive applicants obviates the need for a comparative hearing in this proceeding. See Memorandum Opinion and Order, FCC 91M-2893, released September 23, 1991; 47 C.F.R. § 1.1111(c)(4).

Accordingly, a refund of the hearing fee is warranted. See Memorandum Opinion and Order, 6 FCC Rcd 3403 (1991). A check in the amount of $6,760.00, payable to Richard J. Hayes, Jr., Counsel to Atlantic Radio Communications, Inc. will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEES II 08/13/91
GENERAL ARGUMENT QUERY

Fee Control Number: [9107158170285009]
Applicant's Name: [ATLANTIC RADIO COMMUNICATIONS INC]
Correspondence Address (Line 1): [RICHARD J HAYES JR ESQUIRE]
Correspondence Address (Line 2): [13809 BLACKMEADOW RD]
City: [SPOTSYLVANIA] State/Country : [VA] ZIP Code: [225530000]
Call Sign: [900116MS] Data Changed Flag: [N]

(1) Fee Type Code: MWR Fee Multiple: 0001 Fee Due: $6760.00
(2) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(3) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(4) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
(5) Fee Type Code: Fee Multiple: 0000 Fee Due: $0.00
Total Amount Remitted: $ 6760.00 Overage Amount: $ 0.00
Current Amount: $ 6760.00 Check Flag:

Waiver: Status: Refund: Payment:
Press S for next screen

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 5 1991

Mr. Bruce Naegelen, Advisor
Radio Explorer Post 1400
Route 4, Box 334
Newport, North Carolina 28570

Dear Mr. Naegelen:

This is in further response to your request for a waiver of the $35.00 fee for Restricted Radio Telephone Operator Permits for ten members of the Boy Scouts of America, Radio Explorers Post 1400.

We withheld action on your request to await the Commission's determination of whether members of the Boy Scouts (and other non-profit entities) would be exempted from the fee payment for Restricted Radio Telephone Operator Permits. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), reconsidered in part, FCC 91-298, released October 10, 1991. Therein, the Commission modified its rules to provide that applicants for Restricted Radio Telephone Operator Permits would be exempt from the fee requirement only in certain narrow circumstances. See Id. at ¶¶57-63.

Under the new rules, an individual qualifies for an exemption from this fee requirement if the Permit is to be used exclusively in connection with duties performed at a radio facility qualifying for a fee exemption as a noncommercial educational broadcast station or other specified facility related to the operation of a noncommercial station or if the station is one which receives its funding directly or indirectly through the Public Broadcasting Fund, 47 U.S.C. § 3969(k). See 47 C.F.R. § 1.1112(g).

Because your entity does not fall within the aforementioned criteria necessary for exemption, your request must be denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 25 1991

Robert A. Woods, Esquire
Schwartz, Woods & Miller
Suite 300, The DuPont Circle Building
1350 Connecticut Avenue, N.W.
Washington, D.C. 20036-1702

Dear Mr. Woods:

This is in response to your request for a determination as to whether WJCT, Inc., assignee of MMDS Station WHT675, Jacksonville, Florida, should be exempt from payment of the Commission's filing fees in connection with its certification of completion of construction of the modified facilities of Station WHT675.

You state that WJCT, Inc.'s "noncommercial educational non-broadcast operations on MMDS Station WHT675 will be used in conjunction with the noncommercial educational operations of its licenses public broadcast Stations WJCT-TV/FM at Jacksonville." You indicate that the "[a]pplicant's original transmittal letter [to the Commission], filed April 12, 1988, specifically stated that 'the operations proposed herein are to be used in conjunction with the noncommercial educational broadcast stations on a noncommercial educational basis,' citing the language in Section 1.1112(d) mandating fee exemption in such circumstances." You also refer to specific language in Fees I, which "likewise confirms the propriety of a fee exemption" in this instance, and request a refund for WJCT, Inc. in the amount of $155.00. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 959 (1988).

We agree that WJCT, Inc. has properly certified its eligibility for an exemption from the filing fee through a cover letter attached to the application as required under section 1.1112(d) of the Commission's rules, 47 C.F.R. § 1.1112(d). Accordingly, your request for a waiver is granted. A check in the amount of $155.00 made payable to WJCT, Inc., will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 25 1991

Henry R. Norman, Esquire
Volunteers in Technical Assistance, Inc.
1815 North Lynn Street
Suite 200
Arlington, Virginia 22209-8438

Dear Mr. Norman:

This is in response to your request for a determination as to whether the Volunteers in Technical Assistance (VITA) should be exempt from payment of the Commission's filing fees in connection with its application for authority to construct an international non-profit low-earth orbit satellite (LEO) system.

As stated in your letter, VITA is a duly qualified tax-exempt organization which plans to "construct a non-profit international Fixed Satellite Service ('FSS') system ('VITASAT') consisting of three spacecraft for the provision of international educational, health, environmental, disaster relief, and fundamental technical assistance communications." Because this service "will be provided on a strictly non-profit basis for the benefit of recipients in developing countries," you believe this establishes good cause for waiver of the Commission's filing fees.

Congress did not establish a general waiver for non-profit entities, except for non-profit applicants in the special emergency radio and public safety radio services. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II), 5 FCC Rcd 3558, 3573-3574 (1990); 47 C.F.R. § 1.1112(b). While you state that these "services are virtually identical to those which VITA is proposing . . . albeit on a significantly smaller geographic scale," we emphasize that Congress exempted specific non-profit services, but did not include non-profit LEO systems among these exempted services.

Although, as you indicated, the Commission may waive the fee requirement in specific cases "where such action would promote the public interest," see 47 U.S.C. § 158, the legislative history to section 158 indicates a Congressional intent that this provision be narrowly construed. See Conference Report to accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 423 (1985). In

view of this express limitation on the Commission's authority to grant fee waivers, we cannot find that an organization's non-profit status warrants a waiver of the Commission's fee obligations.

Accordingly, your request for a waiver is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 25 1991

Pat Kelley, Commodore
Sea Scout Association
Columbia Pacific Council
Boy Scouts of America
2145 S.W. Front Avenue
Portland, Oregon 97201

Dear Commodore Kelley:

This is in response to your request for a waiver of a $320.00 filing fee that the Sea Scout Association submitted in connection with the inspection of marine VHF radio (WSP 5896).

You state that one of your boats, a 64' Reliant, (United States Coast Guard certification number 681775), is used for training of Sea Explorers and for the benefit of Boy Scout units. You indicate that the vessel, which was acquired by the Scouts from government surplus, must meet the same standard as commercial charter boats. In addition, you state that since annual operating expenses for the vessel are approximately $3,800.00 ($3,000.00 for required insurance), the $320.00 FCC fee represented a "good share" of these costs. You request a fee waiver for inspection of the vessel's radiotelephone installation in view of the fact that the vessel is owned and operated by a tax exempt organization for the benefit of youthful members.

As a point of clarification, we note that the Commission's $320.00 vessel radiotelephone installation inspection fee is effective for a period of five years. Thus, the cost of the fee apportioned over five years comes out to $64.00 per year to the Sea Scouts, which represents a much smaller fraction of their $3,800.00 annual operating costs than indicated in your letter. See 47 C.F.R. § 80.903.

In a recent action, the Commission specifically addressed the issue of whether the Sea Scouts are exempt from the Commission's ship inspection fee for a vessel operated by its Sea Scout program. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, (Fees II Reconsideration), para. 54, FCC 91-298, released October 10, 1991. As the Commission indicated therein, Congress did not establish a general waiver for non-profit entities, except for non-profit applicants in the special emergency radio and public safety radio services, even though Congress is aware that many not-for-profit organizations use radios to conduct their programs. While your waiver request is based on the fact that

the boat is owned and operated by a tax exempt organization for the benefit of youthful members, we again emphasize that Congress exempted specific non-profit services, but did not include organizations operated for the benefit of youthful members among these exempted services.

Moreover, the Commission indicated that even though it may waive the fee requirement in specific cases "where such action would promote the public interest," see 47 U.S.C. § 158, the legislative history underlying section 158 indicates a congressional intent that this provision be narrowly construed. See Id; Conference Report to accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 423 (1985). Given this express limitation on its authority to grant fee waivers, the Commission concluded that grant of the Sea Scout's request for waiver of the vessel radiotelephone installation inspection fee would not be in the public interest.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

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